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IN THE
Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~823~~ 2

JAMES MARCHETTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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Petitioner James Marchetti prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered on October 29, 1965.

Opinions Below

The opinion of the Court of Appeals, as yet unreported, is printed in the Joint Appendix to this petition (Jt.App. 1a).¹ The opinions in *U. S. A. v. Piccioli*, Docket No. 29521

¹ References are indicated as follows:

References to the numbered pages of the Joint Appendix to Petitions for Petitioners Marchetti and Costello (Jt.App. a).

References to the numbered pages of the Proceedings in United States Court of Appeals Second Circuit (Pro.Ct.App.).

References to the numbered pages of the Appendix to Briefs for Appellants Marchetti and Costello in the Court of Appeals (App. Ct.App. a).

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in the Court of Appeals, and *U. S. A. v. Grassia*, Docket No. 29791 in the Court of Appeals, related cases, are also printed in the Joint Appendix (Jt.App. 16a-29a).

Jurisdiction

The judgments of the Court of Appeals were entered on October 29, 1965. Petitioner's petition for rehearing was denied on November 26, 1965 (Pro.Ct.App. 123). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Should *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax laws here involved, be reconsidered by this Court in the light of recent decisions?

2. Assuming, *arguendo*, the continued validity of cases upholding the constitutionality of the wagering tax laws, were the statutes applied and enforced against petitioner in an unconstitutional manner or so as to violate the proper standards for the enforcement of federal criminal law under this Court's supervisory powers?

3. Did the use, without proper objection at trial, of petitioner's self-incriminatory oral and written post-indictment statements deliberately elicited from him without warning as to his right to counsel vitiate petitioner's convictions?

Constitutional and Statutory Provisions Involved

Petitioner maintains that the judgments of the court below, affirming his convictions for violations of the wagering tax laws and the federal conspiracy statute, violate his rights under the Fifth, Sixth and Tenth Amendments of the United States Constitution. The wagering tax laws, 26 U.S.C. §§ 4401, 4411 and 4412, and the constitutional provisions involved, together with general revenue laws relating to these cases, are set forth in the Joint Appendix to this petition (Jt.App. 29a).

Statement

Petitioner faces a one-year prison sentence and a \$10,000 fine for convictions by a jury presided over by Chief Judge Timbers of the United States District Court for the District of Connecticut upon two indictments charging willful violations of the wagering tax statutes and the federal conspiracy statute (Jt.App. 3a).² His convictions stem from a raid on October 8, 1964, in Bridgeport, Connecticut, in which co-defendants Costello and Gjanci (Jt.App. 3a) and

² In the initial action, Criminal No. 11267 in the District Court petitioner and co-defendants Costello and Gjanci were charged with conspiring to wilfully fail to pay, in violation of 26 U.S.C. § 7203 (Jt.App. 31a), the special occupational tax imposed by 26 U.S.C. § 4411 (Jt.App. 30a) upon persons engaged in the business of accepting wagers and receiving wagers for others.

In the second action, Criminal No. 11270 in the District Court petitioner was charged in two counts with violating 26 U.S.C. § 7203 in failing to pay the special occupational tax required by 26 U.S.C. § 4411 and in failing to register as required by 26 U.S.C. § 4412 (Jt.App. 30a). Co-defendants Costello and Gjanci were also charged in separate indictments, each containing two counts, with the same substantive violations.

35 other defendants (App.Ct.App. 18a) were arrested on similar charges (Jt.App. 3a).

The indictments against petitioner and the others were returned under seal by a grand jury of the District of Connecticut on October 6, 1964, two days before the raid and arrests (Jt.App. 7a; App.Ct.App. 1a, 16a, 123a, 133a); they remained impounded until October 8 at 2:36 P.M. (Jt.App. 7a; App.Ct.App. 18a). Prior to the unsealing of the indictments, the Government distributed a press release (Jt.App. 7a) terming the arrests "a spectacular thrust at the exyensive (sic) gambling activities in" the Bridgeport area, in which "75 special agents of the Intelligence Division, with the aid of 50 State Policemen, swooped down on some 40 establishments." (Jt.App. 7a; App.Ct.App. 70a). The prepared press release mentioned petitioner's name, the amount of bond, the criminal charges and evidential matter relating to the non-existence of wagering tax stamp (Jt.App. 7a; App.Ct.App. 70a), even though two days before, when the indictments were impounded, the District Court had specifically warned:

" . . . there must be no disclosure by anyone as to the identity of those named in the indictment, or even of the fact that such proceedings have taken place by you ladies and gentlemen." (App.Ct.App. 204a).

As the court below summarized, following distribution of the news release:

"The Government took the newsmen to the I.R.S. headquarters where the latter were able to photograph those who had been arrested as they were brought into custody. There was extensive newspaper, radio and

television coverage on October 8 in Bridgeport and elsewhere in Connecticut. On the two following days, the Bridgeport press reported oral statements by Chief Asst. U. S. Attorney Owens to the effect that the government had 'broken the back of gambling' in Bridgeport, that the funds from gambling were supporting prostitution, that housewives had called to express gratitude at the prospective curtailment of their husbands' aleatory propensities, and that Costello and Marchetti had previous convictions for income tax violation." (Jt.App. 8a).

The court below noted that petitioner made no motion directed to this specific publicity prior to the selection of the jury (Jt.App. 8a). However, petitioner did seek a mistrial and a change of venue on the first day of trial. While the jury in the instant action was excused pending selection of other juries in related cases, *The Bridgeport Post* of December 1, 1964 reported that "six more suspected gamblers arrested by federal agents last October today submitted guilty pleas" and that an assistant U. S. Attorney expected others to change their pleas to guilty (Jt.App. 9a). Before the presentation of evidence on December 2, the first day of actual trial, petitioner moved for a mistrial (App.Ct. App. 5a, 207a) and a change of venue (App.Ct. App. 211a), referring to both the earlier publicity at the time of the raid³ and the December 1 article. Both motions were denied by the trial court (App.Ct.App. 5a, 125a, 207-217a).

³ In seeking a mistrial, counsel referred to "motions that were made in previous cases" (App.Ct.App. 207a)—a reference to *United States v. Grassia* (Jt.App. 33a) which clearly indicates both episodes of publicity were being jointly urged as a basis for relief.

At trial the Government's principal evidence against petitioner was (1) the testimony of the undercover agent Ripa and (2) post-indictment, self-incriminatory statements (Govt.Ex. 7; App.Ct.App. 143a) deliberately elicited from petitioner by arresting officers when he had neither waived his right to counsel nor been warned of his constitutional right to consult counsel (Jt.App. 14a).

After the jury returned guilty verdicts against petitioner and the other defendants in all four cases (App.Ct.App. 9a, 52a, 129a, 140a), petitioner filed two post-trial motions: one sought an acquittal or new trial (App.Ct.App. 57a); the other a dismissal of the indictment (App.Ct.App. 59a) because of the conscious and deliberate generation of publicity by the Government and because of the unconstitutionality of the wagering tax statutes (App.Ct.App. 57a-89a). Both motions were denied (App.Ct.App. 11a, 130a).⁴

Immediately after the denial of these motions on January 11, 1965, and before imposing sentence upon petitioner and others (App. Ct.App. 11a-12a, 130a), Chief District Judge Timbers commented extensively about the evils of gambling, narcotics, and prostitution and the lack of State of Connecticut gambling law enforcement (App.Ct.App. 344a-346a). Of the revenue laws here involved, he stated:

"... it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely that of gambling" (App.Ct.App. 344a).

⁴ Both motions appeared on the motion calendar of January 11, 1965 (App.Ct.App. 54a). The trial court allowed argument and then denied the motion for acquittal (App.Ct.App. 12a, 130a). On the motion to dismiss the indictments based on matters which can be raised at any time the court refused even to hear counsel, stating "you run the risk, if you are going to proceed further, of consequences" (App.Ct.App. 342a).

On January 11, 1965, in accordance with Chief Judge Timbers' order conditioning bail upon the filing of a notice of appeal within 24 hours, petitioner appealed to the Court of Appeals for the Second Circuit (App.Ct.App. 11a, 130a), which affirmed the judgments (Jt.App. 2a) and later denied rehearing (Pro.Ct.App. 123).

Relying on *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955), the Court of Appeals rejected petitioner's constitutional attack upon the wagering tax statutes and the manner of their application here, declaring as to the self-incrimination clause argument:

"[W]e find no subsequent opinion [to *Kahriger* and *Lewis*] reflecting on the authority or reasoning of these cases and, at least under such circumstances, it is no proper function of ours to speculate on whether the dissent of yesterday may become the decision of tomorrow." (Jt.App. 6a).

On reargument the court noted by reference (Pro.Ct.App. 121) to the related case of *United States v. Grassia*:

"Recognizing that the rationale of *Albertson v. Subversive Activities Control Board*, — U.S. — (1965), announced subsequent to our Costello opinion, may lead the Supreme Court to overrule its previous decisions in *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination." (Jt.App. 26a).

In regard to the claim of undue publicity, the Court of Appeals recognized that the earlier publicity at the time of the raid "was improper by any standard and might well be a basis for reversal if appellants had moved for a change of venue or a continuance" (Jt.App. 8a). The court found that the December 1 episode was properly raised, but not significant on its merits (Jt.App. 9a-10a). In treating the earlier raid publicity and the December 1 article as completely unrelated episodes, the Court of Appeals made no reference to petitioner's motion for a change of venue (App.Ct.App. 211a) or the fact that defense counsel referred to the "motions that were made in previous cases." (Jt.App. 34a).

With respect to the self-incriminatory, post-indictment statements elicited from petitioner by federal officers in the absence of counsel, the court below equated petitioner's Sixth Amendment argument to a *McNabb-Mallory* contention and held, on the basis of *United States v. Indiviglio*, — F.2d — (2 Cir. 1965), that petitioner's failure to object at trial to the admissibility of the statements was fatal to his claim (Jt.App. 15a).

As noted, the court below denied petitioner's petition for rehearing on November 26, 1965. It did, however, stay the issuance of its mandate to permit the filing of this petition for certiorari (Pro.Ct.App. 118).

Reasons for Granting the Writ

This petition presents significant and fundamental issues relating to the wagering tax statutes and their application in the District of Connecticut. Review of the questions presented is called for (1) because this Court's decisions in

United States v. Kahriger, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax statutes, are in conflict with later decisions of this Court; (2) because the court below has sanctioned the conscious generation of publicity by the Government and statements by the district judge which sufficiently depart from the proper administration of federal criminal justice to call for an exercise of this Court's power of supervision and (3) because there exists a conflict among several of the courts of appeal relating to the need for objection at trial to the use of post-indictment, unconstitutionally-obtained, self-incriminatory statements.

I.

"Are you engaged in the business of accepting wagers on your own account?"

"Do you receive wagers for or on behalf of some other person or persons?" (App.Ct.App. 73a).

It is for his failure to answer these and more detailed inquiries contained in Internal Revenue Form 11-C (App. Ct.App. 73a) that petitioner has been subjected to a one year prison sentence and a \$10,000.00 fine (Jt.App. 3a). As Mr. Justice Black commented in a dissent a decade ago, if a compelled response to these questions

"... would not violate the Fifth Amendment privilege against self-incrimination, it is hard to think of anything that would." *Lewis v. United States*, *supra*, 348 U.S. at 425.

In rejecting petitioner's contention that the self-incrimination clause of the Fifth Amendment protected petitioner,

in the wagering tax context, from having to make any statements save those that "cannot possibly have such tendency to incriminate," *Malloy v. Hogan*, 378 U.S. 1, 12 (1964), the court below relied squarely upon *Kahriger* and *Lewis*. While noting, by reference, in its opinion on rehearing that *Albertson v. Subversive Activities Control Board*, *supra*, may lead this Court to overrule *Kahriger* and *Lewis* "insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination," the court felt that the issue was appropriate only for this Court's determination (Jt.App. 26a).

What petitioner urges is a reappraisal of *Kahriger* and *Lewis* in the light of *Malloy* and *Albertson*.

Significantly, *Kahriger* and *Lewis* were decided without mention of the doctrine this Court firmly established in *Hoffman v. United States*, 341 U.S. 479, 486 (1951): that the privilege against self-incrimination "not only extends to answers that would in themselves support a conviction . . . , but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute . . . , " and without reference to the specific information sought by the Internal Revenue Service form involved here (App.Ct.App. 73a). *Malloy* reemphasized the link-in-the-chain principle ignored in *Kahriger* and *Lewis*; *Albertson* emphasized the questions on the Justice Department registration form, the I.R.S. counterpart of which is involved here and had been ignored in *Kahriger* and *Lewis*.

In *Kahriger* and *Lewis*, the wagering tax statutes were upheld because the Court felt they operated only prospectively and were, therefore, non-compulsory. 345 U.S. at 32, 33; 348 U.S. at 422. But by similar reasoning the

Albertson registration provisions would have been held valid, since individual Communist Party members could terminate their membership within 30 days after entry of a § 786(a) order directed to the Party, 34 U.S.L. Week at 4014, and thus avoid individual registration. Yet this Court invalidated the registration provisions in *Albertson*; and its comments in so doing are equally applicable to the wagering tax statutes and undermine the rationale of *Kahriger* and *Lewis*:

"The risks of incrimination which the petitioners take in registering are obvious. Form IS-52a requires an admission of membership in the Communist Party. Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act . . . or under § 4(a) of the Subversive Activities Control Act . . . , to mention only two federal criminal statutes. . . . *Patricia Blau v. United States*, 340 U.S. 159; *Irving Blau v. United States*, 340 U.S. 332; *Brunner v. United States*, 343 U.S. 918; [and] *Quinn v. United States*, 349 U.S. 195 . . . involved questions to witnesses on the witness stand, but if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes. . . . It follows that the requirement to accomplish registration by completing and filing Form IS-52a is inconsistent with the protection of the Self-Incrimination Clause." *Albertson v. S.A.C.B.*, *supra*, 34 U.S.L. Week at 4016.

Here, too, the risks of incrimination are obvious. For petitioner to pay the tax required by 26 U.S.C. § 4411 (Jt.App. 30a), thereby admitting that he was engaged in

wagering, he would also be required, by 26 U.S.C. §§ 4412 and 6011 (Jt.App. 30a-31a), to furnish on I.R.S. Form 11-C the name and address "where each such business is conducted" and the "name and address" of each employee engaged in receiving wagers (App.Ct.App. 73a).⁵

Disclosure in response to these questions, if not an outright admission of violations of some or all of Connecticut's anti-wagering laws, §§ 53-271 to 53-279, 53-295 to 53-297 (Conn. Gen. Stat., 1958 Rev.) or its criminal conspiracy statute, § 54-197 (Conn. Gen. Stat., 1958 Rev.),⁶ would constitute at the very least a "link in a chain of evidence sufficient to connect" petitioner with such violations. 378 U.S. at 13.

Certainly the listing of employees and agents is tantamount to an admission that there has been an agreement with these persons to be employees or agents in the busi-

⁵ These questions and the more detailed inquiries are contained on I.R.S. Form 11-C which is *both* a special tax return and application for registry, which petitioner would have had to complete in order to pay the special tax prescribed by § 4411 and avoid conviction. By virtue of 26 U.S.C. § 6011(a):

"... Every person required to make a return or statement shall include therein the information required by such forms or regulations."

The Commissioner of Internal Revenue refuses to accept receipt of the \$50 for the stamp without the information required by Form 11-C. The fact that a defendant tenders payment which is refused is no defense to a subsequent prosecution for accepting wagers without payment of the \$50 special tax. *United States v. Mungioni*, 233 F.2d 204, 205 (3 Cir. 1956).

⁶ In *Acklen v. State of Tennessee*, 267 S.W.2d 101 (Tenn. 1954), for example, the defendant was convicted of conspiracy to violate a state gambling statute solely on the evidence that he had purchased a tax stamp.

ness of wagering.⁷ And disclosure of the place of business in which wagering is carried on could lead authorities to a lease, purchase of real estate, or other rental agreement for the purpose of showing overt acts in furtherance of the conspiracy. *State v. McLaughlin*, 132 Conn. 325, 340, 44 A.2d 116, 123 (1945). The overt acts, of course, need not be successful toward accomplishing the object of the conspiracy, *State v. Devine*, 149 Conn. 640, 649, 183 A.2d 612, 616 (1962), and need not be criminal acts in themselves. *United States v. Rabinowich*, 238 U.S. 78, 86 (1915).

If response to the questions asked in *Malloy*, 378 U.S. at 13-14, involved the *possibility* of self-incrimination, compelled compliance with the statutes here involved would make self-incrimination under Connecticut law a practical *certainty*.

To leave *Kahriger* and *Lewis* standing in view of the nature of the self-incriminatory responses called for by the statutory scheme involved in the wagering tax laws is to leave clouded with doubt the proud assertion that the Fifth Amendment privilege reflects our "most noble aspirations." *Murphy v. Waterfront Commission of New York*, 378 U.S. 52, 55 (1964).

⁷ 26 C.F.R. § 44.4412-1(b)(2) requires a person engaging or about to engage in the business of receiving wagers to submit the name of any "employee" or "agent" hired to receive wagers *within 10 days after that* "employee" is so engaged. The "employer," then, is forced to supply the name of someone who will admittedly be in a unique position to bear witness against him. And due to the 10 day delay permitted in the registration of such "employees," the information supplied would relate not only to future criminal act, but also to *past* criminal acts.

II.

Not only do the wagering tax statutes here involved violate the Fifth Amendment, but the manner of their application violates the Tenth Amendment and, at the very least, the proper standards for the enforcement of federal criminal law.

Since *Kahriger*—which rejected Mr. Justice Frankfurter's view that the revenue aspect of the wagering tax statutes constituted merely "verbal cellophane" allowing Congress to "control conduct which the Constitution left to the responsibility of the states," 345 U.S. at 38—this Court has made it clear that no weight can be given to the premise that the enactment of the statutes was "in part motivated by a congressional desire to end wagering." *United States v. Calamaro*, 354 U.S. 351, 358 (1957). Consideration of such collateral motives, this Court added in *Calamaro*, "might place the constitutionality of the statute in doubt." 354 U.S. at 358. Significantly, in affirming over Tenth Amendment objections, the court below ignored *Calamaro* (Jt.App. 1a-15a).

In *Kahriger*, the Court considered only the bare words and history of the statutes themselves. In the case at bar, the manner of application and enforcement of the statutes—both by the Government and the district court—clearly demonstrates that the "constitutionality . . . doubt" feared in *Calamaro* has materialized.⁸

⁸ It is fundamental that the application and enforcement of a federal statute—constitutionally sound on its face—may result in a constitutional denial. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-4 (1886); *Snowden v. Hughes*, 321 U.S. 1 (1944).

The Government's sensational comments—such as “we have definitely broken the back of gambling in the City” (App.Ct.App. 79a)—demonstrate that the revenue statutes were being enforced in a manner unrelated to the collection of a tax (App.Ct.App. 78a-82a, 145a-160a). The trial judge's sentencing remarks compound the Tenth Amendment evil:

“While it is true that these are tax cases, prosecutions authorized by the revenue laws of the United States, it is also a fact, with respect to which the Court is not blind, that *it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely that of gambling.*” (App.Ct.App. 345a) (Emphasis added.)

Even if the combined conduct of Government and court is not interpreted as a Tenth Amendment encroachment, a reversal is called for on the basis of this Court's exercise of its “supervisory power to formulate and apply proper standards for the enforcement of the criminal law.” *Marshall v. United States*, 360 U.S. 310, 313 (1959).

Significantly, this case does not involve the delicate problem which arises from diligent or over-diligent reporting by a free press.⁹ Rather it involves the conscious and deliberate actions of the Government, including manipulation of the unsealing of the indictments in violation of Rule 6(e), to publicize both inflammatory, non-evidentiary material

⁹ To be sure, the responsibility for freedom of the press and the safeguards of the fair administration of justice—both indispensable elements of our constitutional existence—“present,” as Mr. Justice Frankfurter noted, “some of the most difficult and delicate problems for adjudication.” *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950). Because of the active Government role here, however, the Court need not concern itself with such a delicate problem.

and evidentiary material. To effectuate its policy the Government:

1. Prepared prior to the raid on October 8, 1964, and later issued, a press release containing a highly connotative description of the manner in which the federal agents "swooped down" upon petitioner and others (App.Ct.App. 70a). The release mentioned petitioner by name and referred to the amount of his bond (App.Ct.App. 71a).

2. Summoned newsmen, prior to the raid of October 8, 1964, to a private law office in Bridgeport (App.Ct.App. 78a, 155a) where they were briefed and from which they were taken to the office of the Internal Revenue Service, enabling them to photograph defendants as they were brought to a United States Commissioner for arraignment (App.Ct.App. 149a, 151a, 155a).

3. Disclosed to the press, on October 8, 1964, the existence of petitioner's prior criminal record (App.Ct.App. 80a, 153a).

4. Released to the press, on October 8, 1964, and a few days thereafter, highly prejudicial and inflammatory statements, including for example, the following:

"[An assistant U.S. Attorney] today said funds from the gambling operation were supporting 'prostitution and shylocking.'" *The Bridgeport Post*, Oct. 9, 1964, p. 1 (App.Ct.App. 80a, 153a).

"'Thank God, you finally broke it up—my husband's gambling has ruined our home.'

"This remark was one of more than a dozen emotional expressions of gratitude voiced by housewives who

contacted Howard T. Owens, Jr., chief assistant U.S. Attorney in the wake of the gambling raids by Treasury Agents and State police on Thursday.

"Some of the women even cried as they told me how gambling by their husband had caused them continuous hardship' Mr. Owens said." *The Bridgeport Post*, Oct. 10, 1964, p. 1 (App.Ct.App. 157a).

5. Released to the press on October 8, 1964, news of the existence of evidence concerning gambling and the fact that defendants did not possess an occupational tax stamp (App.Ct.App. 72a).

Government conduct resulted in massive publicity which saturated the entire State of Connecticut and surrounding areas (App.Ct.App. 77a-78a, 145a-160a).

To avoid the impact of this conscious generation of publicity—which the court considered "needless intensification" and "improper by any standards" (Jt.App. 8a, 27a)—the court below isolated the pre-trial publicity from the December 1 article (Jt.App. 8a-9a). As to the pre-trial publicity, the court held that petitioner's original, *sub silentio* consent to be tried in Bridgeport negated the effect of the publicity (Jt.App. 8a); as to the later episode, the court held that this was not "seriously prejudicial" (Jt.App. 9a). By treating the episodes of publicity separately, the court concluded that the attack on the earlier publicity

"... was too late; counsel could not speculate on a favorable verdict and then claim lack of 'an impartial jury' when the gamble failed." (Jt.App. 9a)

This approach of isolating the episodes of publicity completely ignored the nature of petitioner's motions for mis-

trial and change of venue (App.Ct.App. 207a-211a). At the time of the motion for mistrial on December 2, 1964, there was a specific reference (App.Ct.App. 207a) to the motions made in related cases on November 17, 1964 (Jt.App. 33a). Certainly, petitioner's motions for mistrial and change of venue before the trial actually started (App.Ct.App. 207a-211a), made in the wake of the related cases, dispute the court's assertion that petitioner intended to "speculate on a favorable verdict."

Considering the publicity as a whole, its means of creation, and its "subliminal stimulation" impact on a jury (App.Ct.App. 83a); Manes, *Irvin v. Dowd: Retreat From Reality*, 22 LAW IN TRANSITION 46, 58 (1962), there is no need to speculate on the effect of any court instructions. While, the trial court's comments were hardly adequate to ascertain the jurors' true feelings (Jt.App. 9a; App.Ct.App. 204a, 216a); petitioner's contention does not rest on that fact. Rather petitioner urges that when the publicity is the Government's doing, reversal is called for under this Court's supervisory power "without pausing to examine a particularized transcript of the voir dire." *Rideau v. Louisiana*, 373 U.S. 723, 727, 729 (1963).

The court below recognized that the Connecticut Chief Judge's January 11, 1965 sentencing remarks (App.Ct.App. 345a) were "ill-advised" (Jt.App. 21a) and that his extensive February 8, 1965 remarks (App.Ct.App. 176a-186a) were "even more ill-advised" (Jt.App. 28a), but failed to review this conduct under its supervisory power. The Connecticut Chief Judge's public urgings to "eradicate this . . . cancer of organized gambling . . . now" (App.Ct.App. 185a)—statements the court below felt where "in the prose-

cutorial area beyond his [the trial judge's] control" (Jt. App. 23a)—indicate, as Judge Learned Hand once wrote, that the:

"...judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials." *United States v. Marzano*, 149 F.2d 923, 926 (2 Cir. 1945).

That the statements were post trial certainly does not eliminate the need for exercise of this Court's supervisory power. As the Supreme Court of Rhode Island said in a similar situation:

"The import of these remarks . . . made immediately after the conclusion of the trial with a verdict of guilty discloses a prejudicial state of mind on the part of the judge that reasonably must be considered to have existed during the trial." *State v. Nunes*, 205 A.2d 24, 27 (R.I. 1964).

III.

After petitioner's arrest at 1:15 P.M. he was detained and interrogated by federal agents in the absence of counsel until 5:15 P.M. (App.Ct.App. 271a, 288a). During this four hour period self-incriminatory written and oral statements were deliberately elicited from him by federal agents (Govt.Ex. 7; App.Ct.App. 143a) without any warning as to his right to counsel (Jt.App. 14a). The statements indicating petitioner accepted wagers and did not possess an occupational tax stamp (App.Ct.App. 143a) were used at the trial on the Government's case-in-chief, without proper objection.

Although a violation of petitioner's fundamental rights is apparent on the face of the record here, the Court of Appeals after first equating petitioner's *Massiah-Escobedo* claim to a Rule 5(a), *McNabb-Mallory* objection, held that neither need be considered because they were "not clearly made at trial" (Jt.App. 15a), citing its *en banc* decision in *United States v. Indiviglio*, — F.2d — (2 Cir. 1965).

In this ruling the lower court's interpretation and application of *Massiah* and *Escobedo* conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Lee v. United States*, 322 F.2d 770 (5 Cir. 1963), with a decision of a different panel of the court below in *U.S. ex rel. Stovall v. Denno*, — F.2d — (2 Cir. 1965, rehearing granted), and with the decision of this Court in *White v. Maryland*, 373 U.S. 59 (1959).

In *Lee*, a federal conviction was reversed because of the introduction at trial of oral admissions of defendant obtained during his interrogation by police after indictment and in the absence of counsel, even though *no proper objection* was made at the trial. As the *Lee* dissent noted, the decision was predicated "on a theory of reversible error, not claimed below but put forward for the first time by the majority. . . ." 322 F.2d at 779.

In *Stovall*, the trial court's order denying a petition for a writ of habeas corpus was reversed on the ground that there was admitted at trial evidence obtained in violation of petitioner's right to counsel and privilege against self-incrimination, *notwithstanding his failure to object* to the admission of such evidence.

In *White*, a state court conviction was reversed by this Court without stopping "to determine whether prejudice

resulted," even though it specifically found a *failure to object* to the admission at trial of evidence obtained in derogation of his right to counsel. 373 U.S. at 60.

To be sure, *Stovall* and *White* were capital cases; but this Court has steadfastly rejected all attempts to distinguish between constitutional rights in capital and noncapital cases. *Glasser v. United States*, 315 U.S. 60, 76 (1942); *Gideon v. Wainwright*, 372 U.S. 335 (1963). As Mr. Justice Clark explained in his concurring opinion in *Gideon*:

" . . . [T]he Constitution makes no distinction between capital and noncapital cases." 372 U.S. at 348-9.

The ruling of the Court below, if undisturbed by this Court, will leave operative a doctrine of waiver by silence or inference which is incompatible with the doctrine of this Court that courts indulge every reasonable presumption *against* waiver of fundamental constitutional rights. *Carnley v. Cochran*, 369 U.S. 506, 514 (1962); *Henry v. Mississippi*, 379 U.S. 443 (1965). And in the present record, unlike the situation in *Henry*, there is *no* evidence that petitioner even knew of, let alone waived, the constitutional rights relied upon now.

Review here, then, is called for so this Court can affirm that the right to counsel, long vigorously applied at other critical stages of federal criminal proceedings, cannot be diluted at the critical stage most recently recognized in *Massiah v. United States*, 377 U.S. 201 (1964)—post-indictment interrogation by arresting officers.

Conclusion

For these reasons, then, this Court should—and petitioner requests that it does—issue its writ of certiorari to review the judgments of the court below.

Respectfully submitted,

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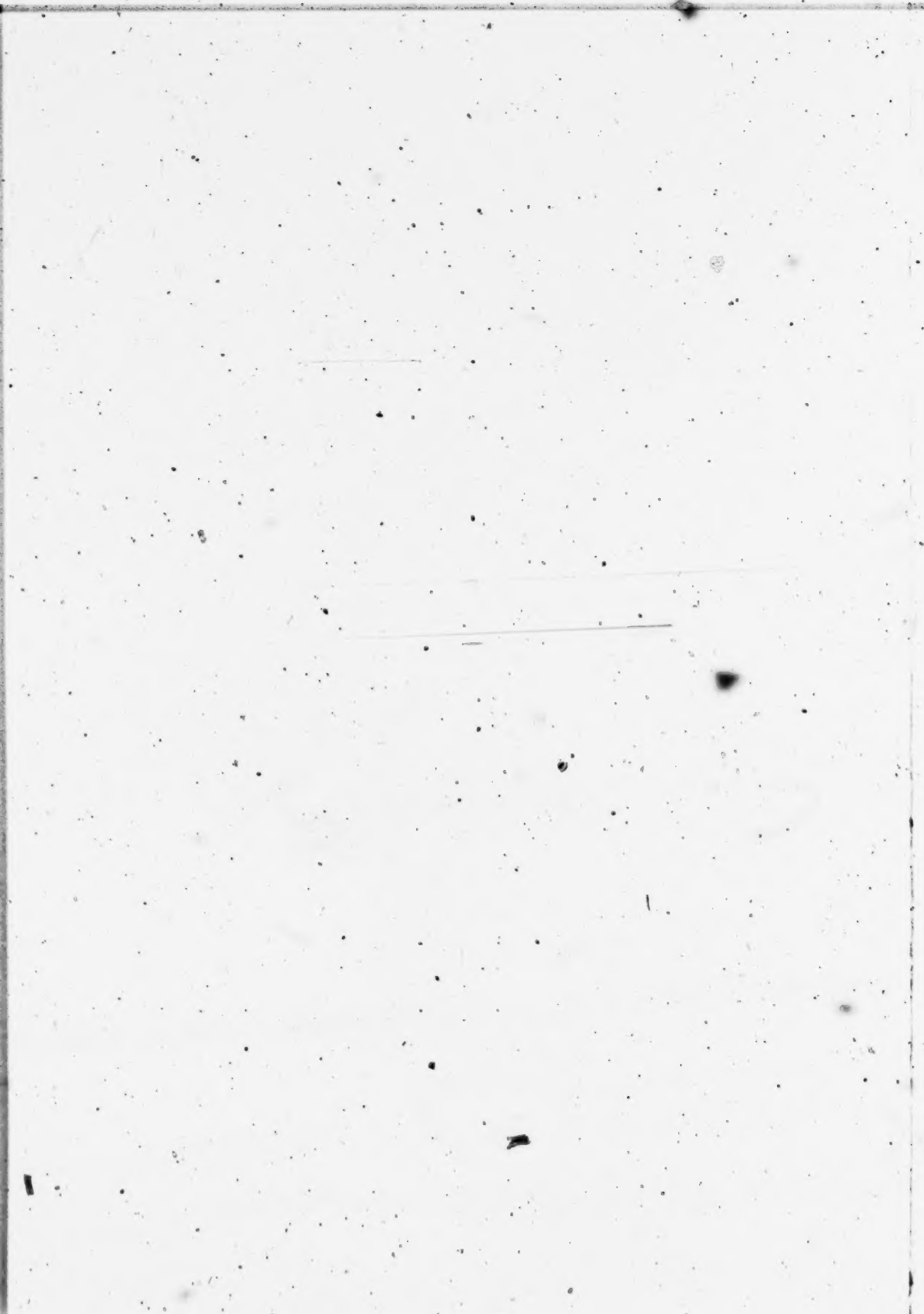
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December 15, 1965.



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Opinion of Court of Appeals
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 481/2/3/4—September Term, 1964.

(Argued June 8, 1965

Decided October 29, 1965.)

Docket Nos. 29524/5/6/7

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK COSTELLO; JAMES "TOTTO" MARCHETTI
and ARTHUR GJANCI,

Appellants.

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK COSTELLO,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES "TOTTO" MARCHETTI,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

—v.—

ARTHUR GJANCI,

Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Appeals from judgments of the District Court for Connecticut, William H. Timbers, *Chief Judge*, convicting appellants, after a verdict, of offenses under the federal wagering tax laws. Affirmed.

PHILIP R. SHIFF, New Haven, Conn. (Adrian W. Maher, on brief), *for Appellant Frank Costello.*

JACOB D. ZELDES, Bridgeport, Conn. (Francis J. King, David Goldstein, Joseph S. Catalano, on brief), *for Appellant Marchetti.*

CARROLL W. BREWSTER (Gumbart, Corbin, Tyler & Cooper, New Haven, Conn.) Kimberly B. Cheney, on brief), *for Appellant Gjanci.*

JON O. NEWMAN, United States Attorney (Howard R. Moskof, Assistant United States Attorney, on brief), *for Appellee.*

FRIENDLY, Circuit Judge:

These three appeals, along with *United States v. Piccioli*, — F. 2d —, and *United States v. Markis*, — F. 2d —, this day decided, stem from a raid carried out by Internal Revenue Service agents and state police in Bridgeport, Connecticut, on October 8, 1964. Appellants Frank Costello, James "Totto" Marchetti and Arthur Gjanci were tried together and convicted on all counts before Chief Judge Timbers and a jury under four indictments. Three two-count indictments similar in form charged each of them with violations of 26 U. S. C. §7203 in that, being engaged in the business of accepting wagers or receiving them for one so engaged, they wilfully failed (1) to purchase the occupational wagering tax stamp required by 26 U. S. C. §4411 and (2) to register as required by §4412. The fourth indictment charged all three with conspiring to fail to purchase the occupational tax stamps. Costello and Marchetti received concurrent one-year prison sentences and \$10,000 fines in the conspiracy case and under Count 1 of their individual indictments; the imposition of sentence was suspended and probation for two years was imposed under Count 2. Gjanci's sentences differed in that the fine was \$2,500.

Certain points are common to the three appeals and, to some extent, to the two others mentioned. After outlining the facts of this case, we shall deal first with these common points and then consider arguments peculiar to various appellants.

In the summer of 1964 Special Agent John Ripa of the I. R. S. was detailed to work in Bridgeport as an undercover agent, posing as a person wishing to make numbers and horse bets and later as a would-be bookmaker. He placed numerous bets with Gjanci and Marchetti at the

Lafayette Diner or, in some instances with respect to Gjanci, at the Greek Coffee House. On October 2, he placed bets with Costello, paying with two marked \$20 bills which were found in Costello's pocket on the latter's arrest. Earlier, on September 3, he had asked Gjanci if he could set up an arrangement to turn in bets and receive a commission. Gjanci said he would speak to Marchetti to arrange this, and also that he would talk to his "bosses—Totto and Frank" about letting Ripa place bets at a local variety store; Gjanci referred to Costello as the "big boss of Bridgeport." On September 9, Marchetti arranged for Ripa to "book on 50%" with "Tony," with settlement to be made with Marchetti. On several later instances Costello made inquiries and gave directions whence the jury could infer that he was indeed "a boss"—if not indeed "the boss," in the enterprise. At trial Costello denied any involvement in the wagering business; Marchetti admitted accepting some bets from Ripa but denied others and also denied Costello's involvement; Gjanci did not testify.

I.

Appellants' most basic point concerns the constitutionality of the federal wagering tax. Recognizing that these provisions were sustained in *United States v. Kahriger*, 345 U. S. 22 (1953), appellants say their situation differs in two respects. One is that statements of the prosecutor and the judge demonstrated that the purpose of the Government's applying the statute against them was not to collect revenue, concededly the only available source of federal power, but to promote the enforcement of state laws against gambling; the other is that the enlargement of the self-incrimination clause of the Fifth Amendment to include federal compulsion of the admission of crime

against the states, see *Murphy v. Waterfront Comm'n*, 378 U. S. 52, 53 n. 1, 77-78 (1964), overruling *United States v. Murdock*, 284 U. S. 141 (1931), and recent emphasis that the clause embraces all statements save those that "cannot possibly" tend to incriminate, see *Malloy v. Hogan*, 378 U. S. 1, 12 (1964), place the *Kahriger* holding on self-incrimination in question.¹

With respect to the first contention, apart from questions as to what effect on constitutionality statements by prosecutors and judges can have, nothing in the present record goes materially beyond what the Supreme Court characterized in *Kahriger* as "suggestions in the debates that Congress sought to hinder, if not prevent, the type of gambling taxed." 345 U. S. at 27 n. 3. If "the verbal cellophane of a revenue measure," 345 U. S. at 38 (dissenting opinion of Mr. Justice Frankfurter), was sufficiently opaque for a majority of the Supreme Court twelve years ago, it remains so for us now. Whether the judge impermissibly allowed considerations unrelated to the nonpayment of the tax to enter into sentence, a claim raised only

1 Marchetti makes an additional argument based on the 1958 amendment, 72 Stat. 1304, which added to §4401(c) a provision that any person required to register under §4412 who receives wagers for or on behalf of another without having registered the name and residence of the latter as §4412(a)(3) requires, shall himself be liable for the tax on wagers to the extent of his receipts. He contends that since §4412 requires registration by persons required to pay the special tax by §4411 and §4411 requires such payment from anyone who is liable for the percentage tax under §4401 or is engaged in receiving wagers for or on behalf of a person so liable, a cross-reference to §4412 in §4401 necessarily renders the statute circular and unintelligible. We see no force in this argument. The 1958 amendment did not affect who was required to pay the special tax and to register, see 3 U. S. Code Cong. & Ad. News 4457 (1958); it simply made persons who failed to comply with the special requirement of §4412(a)(3) liable for the tax on wagers imposed by §4401, when they would not previously have been.

by Piccioli, is a different problem which we will discuss in the opinion in his case.

The contention with respect to the self-incrimination clause would be more serious if *United States v. Kahriger* stood alone, since whatever the stated basis for decision, the result followed so logically from the now-overruled *Murdock* doctrine. However, the Court again considered the Fifth Amendment objection in *Lewis v. United States*, 348 U. S. 419 (1955), which arose in the District of Columbia where wagering was a crime by federal law. The Court disposed of the argument on the basis that "If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment." 348 U. S. at 422. If Congress can constitutionally require, as a condition to gambling, a registration that would show an intention to engage in a business prohibited by a federal law, we can think of no reason why it should not have the same power to require registration that would give notice of an intention to engage in activity made illegal by the laws of a state; and the probability of incrimination for future or even past acts, however great, is irrelevant on the Court's stated theory that the registration cannot be called compulsory. It is true that both *Kahriger* and *Lewis* were decided over vigorous dissents by Justices Black and Douglas on the Fifth Amendment point. But we find no subsequent opinion reflecting on the authority or reasoning of these cases and, at least under such circumstances, it is no proper function of ours to speculate on whether the dissent of yesterday may become the decision of tomorrow. Cf. *United States v. Zizzo*, 338 F. 2d

577, 580-81 (7 Cir. 1964), cert. denied, — U. S. — (1965); *United States v. Cefalu*, 338 F. 2d 582 (7 Cir. 1964). We are therefore not required to consider other arguments on which the Government might rely, such as the lack of any claim of the privilege at an earlier stage, see *United States v. Sullivan*, 274 U. S. 259, 263-64 (1927); *United States v. Kahriger*, *supra*, 345 U. S. at 32, and the required records doctrine, see *Shapiro v. United States*, 335 U. S. 1 (1948); Meltzer, Required Records, the McCarran Act and the Privilege against Self-Incrimination, 18 U. Chi. L. Rev. 687 (1951).

II.

Appellants contend their trial was rendered unfair by publicity, much of it emanating from the Government.

The indictments against appellants and others were returned in New Haven on October 6, 1964; bail was fixed but the indictments remained impounded, F. R. Cr. P. 6(e), until October 8 at 2:36 P.M. A press release distributed earlier by the Government to newsmen announced in part that at 1:20 P.M.: "In a spectacular thrust at the extensive gambling activities in this area, 75 special agents of the Intelligence Division, with the aid of 50 State Policemen, swooped down on some 40 establishments, arresting approximately 45 persons engaged in such gambling activities as policy numbers and betting on horse races and other sports events, in violation of the Federal wagering tax laws. . . . The special agents were successful in breaking up a large, syndicated operation including some of the most important higher-ups in the gambling syndicate." The release mentioned no names except for saying that appellants were charged with conspiracy, as well as with the two substantive counts employed against most other defendants, and

that Costello, Marchetti and a third man had bail fixed at \$10,000, \$5,000 and \$5,000, respectively, while the figure for the other defendants was \$2,500. The Government took the newsmen to the I. R. S. headquarters where the latter were able to photograph those who had been arrested as they were brought into custody. There was extensive newspaper, radio and television coverage on October 8 in Bridgeport and elsewhere in Connecticut. On the two following days, the Bridgeport press reported oral statements by Chief Assistant United States Attorney Owens to the effect that the Government had "broken the back of gambling" in Bridgeport, that funds from gambling were supporting prostitution, that housewives had called to express gratitude at the prospective curtailment of their husbands' aleatory propensities, and that Costello and Marchetti had previous convictions for income tax violation.

The last statement was improper by any standard and might well be a basis for reversal if appellants had moved for a change of venue or a continuance and this had been denied, and examination of the jurors had revealed recollection of these charges. *Marshall v. United States*, 360 U. S. 310 (1959); *United States ex rel. Brown v. Smith*, 306 F. 2d 596, 603 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963); see *Beck v. Washington*, 369 U. S. 541, 555-58 (1962). But appellants did not meet these essential conditions. Being put to plea in New Haven, trial counsel for Costello and Gjanci sought trial in Bridgeport where the publicity had peaked, Marchetti did not object, and no motion for a continuance was made. When the judge examined prospective jurors on November 30, only three of the panel said they had read or heard about the cases, and none of them were chosen. The attack because of the publicity here described came only in a motion in arrest of judgment after

the verdict. This was too late; counsel could not speculate on a favorable verdict and then claim lack of "an impartial jury" when the gamble failed.

Although another episode as to publicity was properly raised, the objection fails on the merits. On December 3, the first day of actual trial, defense counsel, out of the jury's presence, moved for a mistrial because of an article in the Bridgeport Post of December 1 which reported that "six more suspected gamblers arrested by federal agents last October today submitted guilty pleas" and that Owens said he expected others to change their pleas to guilty. At the request of the United States Attorney and with the consent of defense counsel, the court asked the jury, most of whom came from the New Haven area, whether any of them had read anything about the case or related cases since their selection as jurors. None responded, and the motion was denied. Appellants say the jurors' silence did not necessarily reflect the truth since the jurors would not be likely to admit they had violated the judge's previous instructions not to read about the gambling prosecutions. Whatever the force of such a contention might or might not be where publicity subsequent to the selection of the jury could be seriously prejudicial, cf. *United States v. Agueci*, 310 F. 2d 817, 831-33 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963), and cases there discussed, the December 1 article contained nothing that could deprive appellants of a fair trial. If one of appellants had pleaded guilty during the trial, the jury could have been so informed under proper caution. *United States v. Crosby*, 294 F. 2d 928, 948 (2 Cir. 1961), cert. denied, 368 U. S. 984 (1962); *United States v. Dardi*, 330 F. 2d 316, 332-33 (2 Cir.), cert. denied, 379 U. S. 845 (1964). In the light of that principle it is impossible to see what prejudice could result from a prediction that

other defendants, with no relation to appellants save having been seized in the raids of October 8, might change their not-guilty pleas.

III.

Ripa's testimony was received over a chorus of objections on the score of the hearsay rule. Whenever he testified as to a transaction or communication with one of the appellants, the others would object to its reception against them as hearsay; when he testified as to transactions or communications with other persons at the instance of one or more of the appellants, all three would object on that ground to its admission against any who were not present.

The objections betray a clear although common misconception of the nature of the hearsay rule. Only in a few instances was Ripa's testimony of declarations from which the jury was to accept the truth of the matter asserted, such as Gjanci's statement that Marchetti and Costello were his bosses. The basis for an objection in other cases, e.g., by Gjanci to testimony that Ripa had placed bets with Marchetti or with "Tony," is not at all that this is hearsay; the testimony of Ripa—himself on the stand subject to cross-examination—chiefly described acts, and no out-of-court utterance of Ripa, Marchetti or "Tony" was being offered to prove the truth of anything asserted in such utterance, 6 Wigmore, Evidence §1766 (3d ed. 1940); *Aikins v. United States*, 282 F. 2d 53, 57 (10 Cir. 1960); *United States v. Annunziato*, 293 F. 2d 373, 376-77 (2 Cir.), cert. denied, 368 U. S. 919 (1961). The proper objection is that, without more, Ripa's story as to a transaction with one person would not be relevant to prove the crime charged against another.

As the Supreme Court made clear in *Lutwak v. United States*, 344 U. S. 604, 617-19 (1953), there is a distinction

between acts and declarations with respect to admissibility. Out-of-court declarations of an alleged conspirator introduced to prove the truth of the matter asserted meet the obstacle of the hearsay rule; while always receivable against the declarant as an admission, they can be used against others, unless some other exception applies, only on independent proof of agency, see 4 Wigmore, *supra*, §1079, and the agency does not go beyond statements in furtherance of the conspiracy.² Evidence of an act (or a statement offered other than for its truth) has no special evidentiary hurdle to overcome and, whether the act is by a co-conspirator or third person and whether it occurs during the period of a conspiracy or not, the evidence is admissible so long as the act is probative of a crime charged against a defendant and the evidence is not excludable on some special ground.³ Thus, the acts of others not involving the defendant directly may come in against him merely to show the existence of a conspiracy, with which he is to

² Since by hypothesis the conspiracy and defendant's participation must be independently established before the hearsay may be used against him, one may wonder at first blush what role remains for the declaration. Making this point, Judge L. Hand in *United States v. Dennis*, 183 F. 2d 201, 230-31 (2 Cir. 1950) (dictum), *aff'd*, 341 U. S. 494 (1951), suggested that the conspiracy and participation questions be independently decided by the trial judge and the hearsay then given to the jury without limitation. But even if the judge, as in the *Dennis* trial and in the present case, charges that the jury must itself resolve this "preliminary" question beyond a reasonable doubt, the hearsay may still be useful to the prosecution, for example to characterize the conspiracy as to purpose or date, or as evidence that defendant engaged in another crime for which he is on trial. See generally McCormick, *Evidence* §245, at 522 n. 33 (1954).

³ Paralleling the hearsay exception in evidence law—indeed, its very foundation in Wigmore's view, 4 Wigmore, *supra*, §1079, at 127-31—is the debated contention that a defendant will be liable for the substantive crime of another upon independent proof that the actor was furthering a conspiracy in which defendant was a member. See *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 993-1000 (1959). No such instruction was given in this case.

be linked by quite separate proof. An act of any other conspirator during the alleged conspiracy and in furtherance of it almost inevitably meets this test, and, as held in *Lutwak*, acts by such others even before or after the period of the conspiracy may still be relevant in suggesting its existence and its aims. See *United States v. Ross*, 321 F. 2d 61, 68-69 (2 Cir.), cert. denied, 375 U. S. 894 (1963).⁴

Subject to a general point made by Costello which we will mention below, this discussion suffices to dispose of the objections of Marchetti and Costello to the admission of Ripa's testimony as to the placing of bets with Gjanci between July 23 and 31, on the ground that the court had ruled only that a sufficient showing of conspiracy had been made for the period beginning August 12.⁵ Even more clearly it disposes of the objection of each appellant to testimony as to conversations and transactions between Ripa and other appellants and non-parties after August 12. Ripa's testimony that Marchetti had called "Tony" and

4 The briefs exhibit a common confusion in contending that evidence meeting the standard we have indicated would be admissible only under the conspiracy count; such evidence is admissible on substantive counts even when there is no conspiracy indictment at all. *United States v. Pugliese*, 153 F. 2d 497, 500 (2 Cir. 1945); *United States v. Annunziato*, *supra*, 293 F. 2d at 378; *United States v. Smith*, 343 F. 2d 847 (6 Cir. 1965).

5 We note also that although at the time of the admission of this evidence the court may have been satisfied only as to a conspiracy beginning August 12, other competent evidence later introduced warranted a finding that the conspiracy had existed from July 23 and, indeed, long before. Cf. *United States v. Dennis*, *supra*, 183 F. 2d at 231. The comments in the text and in this footnote apply also to the objection that the court allowed testimony as to acts subsequent to October 2, the last date to which the judge, in his initial ruling, had found the conspiracy extended. And there is nothing to Costello's special objection to the admission of evidence relating to acts on October 7; the day after the indictment had been found; the impounded indictment did not end the conspiracy, as the evidence obtained in the October 8 raids demonstrated.

arranged for Ripa to book with "Tony," with Ripa to settle up with him once a week, was plainly admissible against Marchetti and also against the other appellants so far as it might prove Marchetti engaged in a gambling conspiracy to which they might independently be linked. Gjanci's instructions that Ripa should bet with "Carl" and settle with him were admissible on the same basis. Once evidence of these instructions by Marchetti and Gjanci was admitted against appellants, Ripa's testimony that he had then placed bets with Tony and Carl was highly relevant; evidence that the names or telephone numbers led to a gambling enterprise tended to show that the man furnishing the information—and his independently linked co-conspirators—were part of that enterprise. Ripa, in the course of describing his transactions with the appellants and Tony and Carl, naturally told the jury what he himself said or did during the encounters, but this was not to charge his own behavior or statements to the conspirators but simply to provide the necessary context for understanding their conduct which he was relating. *United States v. Morello*, 250 F. 2d 631, 634 (2 Cir. 1957), relied on by appellants, simply held that an out-of-court declaration by an undercover agent acting as a conspirator could not be received against co-conspirators as their admission under the conspiracy exception to the hearsay rule. But as *Morello* itself indicated, the act of a co-conspirator was admissible for whatever it was worth against the defendants, although occurring outside their presence and without their knowledge, so long as their participation in the conspiracy was proved by independent evidence; and the undercover agent's description of his own conduct, apart from the use of his out-of-court statements for their truth, received no censure. 250 F. 2d at 634-35.

Costello argues there was no sufficient independent evidence to connect him with the conspiracy, stressing that Ripa did not meet him until September 14. However, Ripa's testimony as to what Costello said and did on that occasion and later amply justified a finding that Costello was one of the "bosses" and had been so from the outset. With the declarations of Gjanci as to Costello's role thus made competent, the contention that the Government failed to adduce sufficient evidence to warrant submission of Costello's case to the jury falls by the wayside.

A final objection relates to oral and written post-arrest statements by Marchetti, discussed in another context below. These were offered and received only against him. In his charge the judge said that the oral statements were received only against Marchetti, but that the written statement was received against all defendants in the conspiracy case although not in the substantive cases other than Marchetti's. No exception to the erroneous instruction was taken. It is plain that if one had been, the judge would have corrected his mistake. For reasons fully explained in *United States v. Kahaner*, 317 F. 2d 459, 478-79 (2 Cir.), cert. denied, 375 U. S. 836 (1963), we decline to notice the point.

IV.

As just indicated, Marchetti was interrogated after arrest by a Special Agent, who recorded his oral answers on a question sheet which Marchetti then signed. Apparently Marchetti was first warned of his right not to answer any questions but not of any right to confer with counsel. The agent's testimony and the question sheet were received in evidence against Marchetti without objection. After warning of his right not to answer questions that would incriminate him under federal law, another agent asked Gjanci if

he had a federal tax stamp and, this being answered in the negative, why not; Gjanci replied that he didn't accept wagers but "just play[ed] the numbers." No objection to this testimony was made.

Marchetti and Gjanci now urge that reception of this evidence violated their rights under the Assistance of Counsel clause of the Sixth Amendment as interpreted in *Massiah v. United States*, 377 U. S. 201 (1964), and *Escobedo v. Illinois*, 378 U. S. 478 (1964), and under F. R. Cr. P. 5(a) as implemented by *McNabb v. United States*, 318 U. S. 332 (1943), and *Mallory v. United States*, 354 U. S. 449 (1957). The Government contends, *inter alia*, that Gjanci's statement was exculpatory (save as to his stipulated failure to have a tax stamp) and that Marchetti's failure to object was deliberate, since, there being overwhelming proof against him, his sole objective was to protect Costello, as the statement did. We find it unnecessary to examine these contentions. We held some years ago that we need not consider *McNabb-Mallory* objections not clearly made at trial, *United States v. Ladson*, 294 F. 2d 535, 538-39 (2 Cir. 1961), cert. denied, 369 U. S. 824 (1962). In the course of its *in banc* consideration of a number of cases involving *Massiah* and *Escobedo* claims arising out of trials after those decisions, the court has reached the same general conclusion, *United States v. Indiviglio*, — F. 2d — (1965), and we find no special circumstances warranting different action here.

We have carefully examined appellants' other claims of error but do not consider them to require discussion. The Court is indebted to Carroll W. Brewster and Kimberly B. Cheney, assigned counsel, for their presentation on Gjanci's behalf.

Affirmed.

Opinion of Court of Appeals in U. S. v. Piccioli

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 489—September Term, 1964.

(Argued June 8, 1965

Decided October 29, 1965.)

Docket No. 29521

UNITED STATES OF AMERICA,

Appellee,

—v.—

CARL A. PICCIOLI,

Appellant.

Before:

WATERMAN, FRIENDLY and SMITH,

Circuit Judges.

Appeal from a judgment of the District Court for Connecticut, William H. Timbers, *Chief Judge*, convicting appellant, after a verdict, on a two-count indictment charging violation of 26 U. S. C. §7302 by wilful failure to pay the special gambling occupational tax, 26 U. S. C. §4411, and to register, 26 U. S. C. §4412. Affirmed.

PHILIP BAROFF, Bridgeport, Conn. (Charles Hanken on brief), *for Appellant.*

HOWARD T. OWENS, JR., Assistant United States Attorney (Jon O. Newman, United States Attorney, District of Connecticut), *for Appellee.*

FRIENDLY, *Circuit Judge*:

Piccioli was charged in a two-count indictment with violating 26 U. S. C. §7302 by wilful failure to pay the special gambling tax, 26 U. S. C. §4411, and to register, 26 U. S. C. §4412, and was convicted on both counts before Chief Judge Timbers and a jury. He was sentenced on the first count to imprisonment for one year and a fine of \$5,000; on the second, imposition of sentence was suspended and probation fixed at two years.

Piccioli was one of the proprietors of the Pin-Up Bar in Bridgeport. Special Agent Ripa of the I. R. S., testified (on cross-examination) that "Artie" Gjanci, a defendant in *United States v. Costello*, — F. 2d — (2 Cir. 1965), instructed that, through arrangement between himself and Piccioli, Ripa could place bets with Piccioli and that, when doing this by phone, he should say "This is Bill for Artie." Thereafter Ripa placed numerous horse race bets with Piccioli. There was evidence of furtiveness on Piccioli's part in accepting Ripa's wagers and paying his winnings. During the October 8 raid described in the *Costello* opinion, Special Agent Macolini obtained nearly \$500 in cash and checks from Piccioli's pockets, along with three issues of a horse racing publication used by book-makers. On that occasion in one hour a Connecticut State Trooper engaged in the search of the Pin-Up Bar received 23 calls from persons who were seeking to ascertain odds or, as the jury could properly infer, were about to place bets. Since this and other evidence warranted conviction, we turn to Piccioli's claims of error:

(1) Our *Costello* opinion details the publicity on October 8 and 9. When Piccioli was put to plea in New Haven on October 21, he requested that trial be had in Bridgeport, where the publicity had been most intense. On November

30 and December 1 four juries to try Piccioli's and other gambling cases were selected from the same venire, apparently with the understanding that the cases would be tried *seriatim*; the record shows no objection to that procedure and, when Piccioli's jury was being selected, the only venireman who recalled reading or hearing of his case was not chosen. His trial was adjourned until after that of Costello, Marchetti and Gjanci, which was widely publicized in the Bridgeport press. Piccioli's name figured in this, he being the "Carl" referred to in our opinion in that case; the papers reported he had been subpoenaed by the Government and had been excused at his lawyer's request. When Piccioli's case was called for trial on December 15, his counsel sought a new jury or a continuance because of the publicity given the Costello trial and Piccioli's involvement in it. The judge denied this but said he would inquire of the jurors, which he did without objection from counsel. When asked whether they had read or heard anything about the case or about Piccioli, there was no response.

In this aspect Piccioli's case is not significantly different from that of Costello, Marchetti and Gjanci. No objection on the score of the publicity on October 8 and 9 was made before the adverse verdict. The only issue relating to publicity which was brought to the judge's attention prior to trial was the newspaper accounts of the trial of Costello, Marchetti and Gjanci. A correct report of the trial and conviction of other persons for the same type of offense would not in and of itself be prejudicial, even when, as here, one of them figured in the evidence at the later trial; and there is no reason to suppose the jurors would read into the request that Piccioli be excused a claim of the privilege against self-incrimination. Moreover, we see no reason why the judge had to disbelieve the jurors' responses that the reports had not come to their attention.

(2) Another point has more merit but, in our view, not enough to demand reversal. Special Agent Macolini testified that after completing his search at the Pin-Up Bar, he told Piccioli and the latter's attorney, Mr. Hanken, who had entered the kitchen area in pursuit of a cup of coffee shortly after the raid, that he would like to ask "a few personal history questions"; that the attorney said he had instructed Piccioli not to answer questions; that Macolini then submitted his question sheet to Mr. Hanken; and that the attorney allowed Piccioli "to answer those personal history questions that were on the sheet." No objection was made to this, and the subject was not revived by counsel in cross, redirect, or recross examination. At the conclusion of Macolini's testimony, the judge reverted to this episode and, over objection by defense counsel, elicited an affirmative answer from Macolini to a question, "But the defendant was instructed in your presence by Mr. Hanken not to answer any questions with respect to whether or not he was accepting horse wagers on the premises." After listening to argument, the judge said, "I simply wanted to get it clear in my mind, and I assume the jury did also, as to precisely what happened," and then instructed "that, once the defendant was placed under arrest, it was his privilege under the Constitution not to answer any questions that might tend to incriminate him under Federal law . . . What brought the question on my part was, I was not quite sure what was meant by personal history questions, as distinguished from whatever questions he declined to answer." In submitting the case to the jury, the judge recounted Macolini's testimony and added that Mr. Hanken had a right to advise Piccioli not to answer questions and that Piccioli had a constitutional right not to do so.

Inquiry designed to establish that a defendant claimed the privilege against self-incrimination before a grand jury

or a legislative committee or failed to testify at a former trial has been held in several cases to constitute reversible error. See *Grunewald v. United States*, 353 U. S. 391, 415-24 (1957); *Stewart v. United States*, 366 U. S. 1 (1961); *United States v. Gross*, 276 F. 2d 816 (2 Cir. 1960). If the privilege attaches at the moment of arrest, as the judge assumed, inquiry to show its assertion at that time would seem equally banned.¹ And we would reach the same conclusion although that assumption is wrong and the right of an arrested person not to respond rests simply on the lack of any power in the police to compel testimony—a hotly controverted issue² which we need not here decide. Silence under such circumstances, at least when, as in this case, it results from the advice of an attorney, affords no fair ground for relevant inference, see *Kelly v. United States*, 236 F. 2d 746, 749 (D. C. Cir. 1956); yet a jury would be likely to give it not inconsiderable weight. As said by Mr. Justice Harlan in *Grunewald, supra*, 353 U. S. at 424, with respect to a claim of privilege before a grand jury, “the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used.” Cf. *McCarthy v. United States*, 25 F. 2d 298 (6 Cir. 1928); *United States v. Pearson*, 344 F. 2d 430 (6 Cir. 1965).

1 Presumably this is what is meant by the statement in *Fagundes v. United States*, 340 F. 2d 673, 677 (1 Cir. 1965), characterizing the right to remain silent on arrest as “akin to the right to decline to take the witness stand in one’s own defense.” See also *Helton v. United States*, 221 F. 2d 338, 340-42 (5 Cir. 1955); but see *Kelly v. United States*, 236 F. 2d 746, 750-51 n. 10 (D. C. Cir. 1956).

2 See 8 Wigmore, Evidence §2252, at 328-29 & n. 27 (McNaughton rev. 1960); Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 27-30 (1949); Note, The Privilege Against Self-Incrimination: Does It Exist in the Police Station?, 5 Stan. L. Rev. 457 (1953); 1 Morgan, Basic Problems of Evidence 146-48 (1961); Maguire, Evidence of Guilt §2.03, at 15-16 (1959).

The judge's question, for which the cold record affords no apparent reason, was thus ill-advised, to say the least. Nor was it cured, as the Government urges, by his subsequent instruction that the lawyer and Piccioli had been acting within their rights; the proper caution would have been that the evidence was to be disregarded and no inference drawn therefrom. But we cannot see that the question and answer added anything so significant to what Macolini had testified on his direct examination without objection as to afford sufficient basis for reversal, 28 U. S. C. §2111, F. R. Cr. P. 52(a).

(3) The final point requiring discussion is the contention that the judge took impermissible considerations into account in passing sentence.

Piccioli was sentenced on January 11, 1965, along with defendants in other gambling tax cases. In explaining the sentences in the *Costello*, *Marchetti* and *Gjanci* cases, Chief Judge Timbers made certain remarks which we set forth in part in the margin.³ He followed these by recommending

3 "The Court regards these charges as serious. It is faced with the duty of imposing sentence following a finding of guilty by a jury.

"While it is true that these are tax cases, prosecutions authorized by the revenue laws of the United States, it is also a fact, with respect to which the Court is not blind, that it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely that of gambling.

"While it is perfectly true, and no one knows better than the Court, that the charge against these defendants was not that of gambling, it is equally true that the prosecutions never would have been brought and there never would have been convictions but for extensive gambling and accepting of wagers as demonstrated by the evidence.

"As this Court has observed before, one of the handmaidens of vice in any community—here graphically demonstrated in the Bridgeport community—one of the handmaidens of vice is that of gambling. The other two, with which this Court has dealt severely and will continue to deal severely, are those of narcotics and prostitution. Of course it is

that the United States Attorney forward a transcript of them and of the evidence to Connecticut prosecutors. Later, on February 8, before taking up the criminal calendar in New Haven, Chief Judge Timbers made a further statement about the gambling tax cases with which he had been concerned. In this statement, some nine printed pages long, he praised the work of the United States Attorney and his staff, of the Intelligence Division of the Internal Revenue Service, and of the Connecticut State Police; deprecated the absence of cooperation by the local Bridgeport police and "the apparent lack of willingness or ability on the part of certain of the prosecutors (in one instance under the pretense of 'public apathy,' which is pure, unadulterated bunk) and judges of the state circuit court to back up the local and state police in enforcing the gambling laws of this state"; and noted "the ground swell of public support throughout the state for what has been accomplished by this latest federal crackdown upon gambling and organized crime." After announcing his intention to impose stiff sentences for violation of the federal gambling tax and related laws, he ended by proposing that a Connecticut Conference on Law Enforcement be convened, and outlined a detailed program for its membership and activities.

The circumstances under which an appellate court will interfere with a sentence within the permissible maximum because of the judge's reliance on allegedly irrelevant cri-

well known that the revenue from gambling is the financial basis or keystone upon which much of crime is built.

"The Court does not intend, in imposing sentence here, to deal out the slap on the wrist which has characterized sentences imposed by the State Courts for violations of the State gambling laws. The Court intends, by the sentences here to be imposed, to serve a stern warning, once again, as the Court has repeatedly in the past, that the United States is not powerless to deal effectively with violations of the Federal revenue laws and particularly the law here involved. It will do so, if need be, alone."

teria, see *United States v. Wiley*, 267 F. 2d 453 (7 Cir. 1959), are and, so long as such sentences are generally unreviewable, ought be rare. It would be wholly appropriate for the judge to look beyond Piccioli's failure to register and buy a \$50 tax stamp and to consider the attendant substantial losses of revenue through his failure to pay the percentage tax on wagers, of which the judge had heard abundant evidence, even though that crime had not been charged. Cf. *United States v. Doyle*, — F. 2d —, — (2 Cir. 1965). Piccioli's argument is thus reduced to the claim that the judge was enforcing not simply the federal laws which were his proper concern but state laws which were not. The record does suggest that the judge's indignation at what he had learned at the trials and from presentence reports may have led to statements in the prosecutorial area beyond his function. On the other hand, since he could have taken into account a record of state crimes and charges unrelated to the federal offense proved, it would be strange if he could not consider that the evidence showed a violation of state gambling laws and the effect of gambling on other state crime. Cf. *United States v. Doyle*, *supra*.

Piccioli's other points either are dealt with in *United States v. Costello* or lack sufficient merit for discussion.

Affirmed.

Opinion of Court of Appeals in U. S. v. Grassia

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 105—September Term, 1965.

(Argued October 28, 1965 Decided November 26, 1965.)

Docket No. 29791

UNITED STATES OF AMERICA, ..

Appellee,

—v.—

ALFRED GRASSIA,

Appellant.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and SMITH, *Circuit Judges.*

Defendant, having been charged in a two-count indictment, in the District Court for Connecticut, with willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411, in violation of 26 U. S. C. §7203, changed his plea of not guilty to one of *nolo contendere* on one count, and appeals from the resulting conviction by Judge Clarie. Affirmed.

JACOB D. ZELDES (David Goldstein, Bridgeport, Conn., on brief), *for Appellant.*

JON O. NEWMAN, United States Attorney for the District of Connecticut, *for Appellee.*

FRIENDLY, *Circuit Judge*:

This is another appeal stemming from the raids relating to enforcement of the federal wagering tax at Bridgeport, Connecticut, on October 8, 1964. See *United States v. Costello*, — F. 2d — (2 Cir. 1965), *United States v. Piccioli*, — F. 2d — (2 Cir. 1965), and *United States v. Markis*, — F. 2d — (2 Cir. 1965). Alfred Grassia, represented by counsel and duly questioned by Judge Clarie at a term of the District Court for Connecticut at Hartford, to which, at his request, his case had been transferred for trial on his not guilty plea, pleaded *nolo contendere* to one count of a two-count indictment charging, under 26 U. S. C. §7203, willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411. The other count was then dismissed at the Government's request. His points on appeal from the resulting conviction fall into two categories. The first repeats the same constitutional attacks on the federal wagering tax statutes that were advanced in the earlier cases. His other point is that the conscious generation of publicity by the Government and statements by Chief Judge Timbers in the course of other proceedings in January and February, 1965; prior to Grassia's change of plea,¹ see *United States v. Costello*, *supra*, — F. 2d at —, slip opinion at 3325-26; *United States v. Piccioli*, *supra*, — F. 2d —, slip opinion at 3340-41, so prejudiced his opportunity for a fair trial that the indictment should have been dismissed.

The first group of contentions, challenging the constitutionality of the federal wagering tax statutes, survive the plea of *nolo contendere*, as the Government concedes. But, so far as this Court is concerned, they have been deter-

¹ The judge's statements were the basis of one of several motions by Grassia to dismiss the indictment or for a continuance.

mined adversely to Grassia by *United States v. Costello*, *supra*, — F. 2d —, slip opinion, 3322-25. Recognizing that the rationale of *Albertson v. Subversive Activities Control Board*, — U. S. — (1965), announced subsequent to our *Costello* opinion, may lead the Supreme Court to overrule its previous decisions in *United States v. Kahriger*, 345 U. S. 22 (1953), and *Lewis v. United States*, 348 U. S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination.

As to Grassia's other contention, that his right to a fair trial was compromised by adverse publicity, the United States concedes that, at the time of the change of plea and the dismissal of the second count, counsel made clear to the prosecutor and the court that Grassia intended to press the point on appeal, contrast *United States v. Doyle*, 348 F. 2d 715, 720 (2 Cir. 1965); but it urges that a claim of the impossibility of obtaining an impartial trial is necessarily foreclosed when the defendant, freely and with the assistance of counsel, decides not to have one. Grassia responds that a defendant cannot be required to undergo a trial which the prosecution or the court has forced to occur at a place or a time that is inconsistent with the guarantees of the Sixth Amendment. His point is that the Amendment guarantees not only trial by an impartial jury but a "speedy" trial in the district where "the crime shall have been committed." He says that when this has been made impossible by the Government, as distinguished from third parties, the conventional remedies of extended continuance or change of venue are inappropriate since these involve a sacrifice of Sixth Amendment rights, and the only suitable remedy is dismissal of the indictment, thus rendering in-

consequential any plea of *nolo contendere* and waiver of trial.

We do not find it necessary to consider whether a case might conceivably arise where the Government's conduct in generating publicity had been so egregious and the prejudice engendered by it so pervasive, cf. *Irvin v. Dowd*, 366 U. S. 717 (1961), that the drastic sanction of dismissal of the indictment would be demanded, in the interest of the particular defendant or for general therapeutic purposes, or for both. It suffices for decision here that the hurdle confronting any such claim must be exceedingly high and that Grassia does not come close to meeting it. Although we disapprove of what seems to have been needless intensification by the Government of the news of the arrests and, still more, of the unnecessary statements by the Chief Assistant United States Attorney on the two following days, see *United States v. Costello*, *supra*, — F. 2d at —, slip opinion, 3326, it proved possible to obtain impartial juries even at Bridgeport where the publicity was at its peak, see *United States v. Piccioli*, *supra*, — F. 2d at —, slip opinion, 3336-37; *United States v. Markis*, *supra*, — F. 2d at —, slip opinion, 3344. Criminal defendants are understandably prone to exaggerate the interest their fellow citizens take in matters of such acute concern to them. The transfer of Grassia's trial to Hartford, also within the "district," on December 4 on his request, although doubtless prudent, thus did not result from any demonstrated impossibility of obtaining a speedy trial by an impartial jury in Bridgeport.² And although the fact that defendants arrested in the October raid were still awaiting trial rendered Chief Judge Timbers' statement of February 8, 1965, even

² As indicated in *United States v. Costello*, *supra*, — F. 2d at —, slip opinion, 3327, jury panels at the terms held in Bridgeport are not limited to residents of that city.

more ill-advised than we indicated in *United States v. Piccioli, supra*, — F. 2d at —, slip opinion, 3342, we are wholly unconvinced that this pronouncement, combined with the preceding publicity generated by the prosecutor and the judge, made it so plainly impossible to obtain an impartial jury in Hartford as to relieve Grassia of any need to develop the facts by adhering to his plea of not guilty and examining the venire at Hartford on a voir dire.

Affirmed.

**Statutes, Constitutional Provisions, and
Regulations Involved**

68A Stat. 525 (1954), 26 U. S. C. §4401 (1958): *Imposition of tax*

(a) Wagers—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

68A Stat. 527 (1954), 26 U. S. C. §4411 (1958): *Imposition of tax*

There shall be imposed a special tax of \$50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

68A Stat. 527 (1954), 26 U. S. C. §4412 (1958): *Registration*

(a) Requirement—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental

information from any person required to register under this section as may be needful to the enforcement of this chapter.

68A Stat. 851 (1954), 26 U. S. C. §7203 (1958): *Willful failure to file return, supply information or pay tax*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

68A Stat. 732 (1954), 26 U. S. C. §6011 (1958): *General requirement of return, statement, or list*

(a) General rule.—When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

Amend. V, U. S. Const.: *Capital Crimes; Double Jeopardy; Self-incrimination; Due Process; Just Compensation for Property.*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amend. VI, U. S. Const.: *Jury Trial for Crimes, and Procedural Rights.*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amend. X, U. S. Const.: *Reserved Powers to States.*

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

26 C. F. R. §44.4412-1 (B)(2): *Registration.*

“(2) Each person engaged in the business of accepting wagers on his own account shall report on Form

11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter, a return shall be filed on Form 11-C, marked "Supplemental," each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10 days after the date such additional employee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see §44.4905-2.

Excerpt From Proceedings of November 17, 1965

[The following portion of the transcript was not printed in petitioners' appendix in the Court of Appeals, but is contained in the record on appeal filed in the Court of Appeals pursuant to Criminal Rule 39(b)(1), Civil Rule 75(o) and Second Circuit Rule 11(a) and certified to this Court by the Clerk of the court below. The discussion relates to motions in *United States v. Garamella*, which was dismissed on motion of the Government, and *United States v. Grassia*, *supra* (Jt. App. 24a). Both cases stem from the same raid by the Internal Revenue Service referred to in the instant cases. Petitioners reprint portions of the transcript here for the convenience of the Court, so that comments of trial counsel for petitioners regarding "motions that were made in previous cases of similar nature" (207a) may be more meaningful. The references set off by dashes are to the numbered pages of the original papers constituting the record on appeal in the court below.]

**Transcript of Proceedings Held on November 17, 1964,
in Connection With Motions in the Above-Entitled
Cases and in Related Cases (Other Occupational Tax
Stamp Cases)**

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Bridgeport

Criminal No. 11,267

UNITED STATES,

—VS.—

FRANK COSTELLO *et al.*

Criminal No. 11,269

UNITED STATES,

—VS.—

FRANK COSTELLO.

35a

Criminal No. 11,278

UNITED STATES,

—VS.—

ARTHUR GJANCI.

Criminal No. 11,270

UNITED STATES,

—VS.—

JAMES "TOTTO" MARCHETTI.

Before:

HON. WILLIAM H. TIMBERS,

Chief Judge.

I hereby certify that the attached transcript is a true and correct transcript of notes taken by me on November 17, 1964.

AUSTIN M. PHELPS
Official Court Reporter

March 7, 1965

Tuesday, November 17, 1964, 10 A.M.

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Mr. Zeldes: Could I inquire about the status of the calendar?

The Court: Yes.

Mr. Zeldes: I have numerous people here under subpoena with regard to the defendant Grassia's motion to dismiss the indictment.

I wonder if I could excuse them until 2 o'clock, or what the Court's—

The Court: This is on the motion to dismiss in Grassia

and Garamella?

Mr. Zeldes: Yes, your Honor. There are several others. There are some motions to suppress. I believe they are ahead of us. And a motion to dismiss on Christiano.

Mr. Owens: The only matter that is left, other than the resolving of the bill of particulars, is the United States vs. Christiano on the motion to suppress, your Honor, and the motion to dismiss would follow after that.

The Court: To answer Mr. Zeldes' question, any witnesses under subpoena, in any of these cases may be excused until 2 o'clock.

Mr. Zeldes: Thank you very much.

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MOTIONS TO DISMISS AND FOR CONTINUANCE

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Tuesday, November 17, 1964, 2 P.M.,

Afternoon Session

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Mr. Zeldes: Before we proceed, your Honor, I notice, for the record, Mr. Newman has handed up some affidavits in briefs.

I just want to indicate I am not waiving any rights nor in any way conceding the right of the Government to proceed by affidavits at this time.

May I proceed, your Honor?

The Court: Yes.

Mr. Zeldes: At the outset I would point out to the Court that in both of these cases, under date of November 13, I filed a notice to produce to the Government. And I understand from the Government that it will produce the press releases, two of the items I have requested.

And at this time I would request that the press release prepared by the representative of the United States prior to the raids of October 8 be marked as the first exhibit.

The Court: Well, I am going to defer, at least for the time being, any determination, any decision, as to whether evidence will be received at this hearing, either oral or documentary.

What you referred to so far is a document which I assume

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can be attached to an affidavit submitted in the usual form.

Mr. Zeldes: Not unless the Government does, your Honor. I didn't prepare the press release. If the Government will concede that the document they referred to in

their brief is the press release—of course I have no way of establishing it short of calling on the United States Attorneys. I am trying to avoid that, in the course that I have proceeded under so far.

The Court: I would assume that any document submitted by the Government in response to a motion to produce could be deemed by the Court to be an accurate copy of whatever it purports to be.

What I am getting at is, I am not prepared—I am not ruling one way or the other as to whether this is to be an evidentiary hearing. I want to hear arguments of counsel on the points of law involved.

Now if you want me to look at a press release, I understand the Government has produced it and said it is accurate, if there is any question about it. I assume it can be

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used for all purposes by the Court, under those circumstances.

Mr. Newman: So the record may be clear, your Honor, the so-called press release that was requested by counsel was furnished to counsel I believe on November 12. A copy of it is attached to my memorandum for the Court's benefit so that it is before us, certainly, for purposes of argument on these motions.

As far as defendant's notice to produce, I am aware of its existence. I confess I am not aware of its legal significance but we perhaps can deal with that subsequently during this proceeding. But the item that has been discussed so far, has already been handed to defense counsel and handed forward to the Court.

Mr. Zeldes: Should it be marked, your Honor, so that it is part of the record rather than part of a brief, which is technically not part of the record?

The Court: For the time being, I decline to have any evidence marked. I do think it is sufficiently before the Court to enable the Court to rule on this motion. It is at-

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tached to a brief of counsel, and that would apply to a brief on either side.

Mr. Zeldes: May I just say this, if your Honor please? When the motions were filed there was a notification to counsel for the Government that evidence would be offered and that subpoenas would issue. As a result, I have under subpoena here today four or five people who have spent most of the day sitting in court. They are important people in the community. There was no objection raised by the Government, when the motion was filed, to the taking of any evidence. The Government filed a brief this morning which is in essence a factual brief, reciting certain stated facts.

And now I am in the position that it is 3:30. I have people here who are very busy people. I would like to proceed.

There has been no objection to any evidence coming.

The Court: The Court makes the determination, though, Mr. Zeldes. Regardless of agreement of counsel, as to whether evidence is necessary on a motion, whether it is to be oral testimony, depositions, or it may very well be

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that the facts are stipulated so that it may eventuate with an agreement on the facts that makes taking of oral testimony unnecessary.

Mr. Zeldes: The only thing I can say in that regard, if your Honor please, is it takes me sort of short. The essence of the argument, as your Honor is aware if you have had a chance to read the brief, is a factual argument. Under the

decisions in United States against Hoffa, the Court held the hearings on this subject.

It seems difficult for the Court to weigh the publicity if it doesn't have the publicity. That is my job today, to try to give you the publicity.

I might say this, that I have an alternative motion which may perhaps cut through the point your Honor has perhaps rightly raised, and I didn't think of it. And that is the motion for continuance. Then I think there would be no question whatsoever that the Court would want to hear the publicity and the extent of the publicity.

I would like to file this at this time, your Honor. I notice in the Government's brief they suggest a motion for con-

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tinuance should have been made instead of what I labeled it. So, if your Honor please, I filed these two documents so that perhaps we can proceed with the factual basis.

The Court: If you can, I would suggest you go ahead with your argument. As you say, the hour is getting late.

And I have not ruled—I want to make it perfectly clear—one way or the other on your application to take oral testimony. All I am saying is that I want to find out what the motion is all about and see whether there are issues which require the taking of evidence.

Mr. Zeldes: Your Honor, in respect to the motion for continuance, we say that there has been excessive publicity, some of which, just for the immediate attention of the Court, we have put in the form of our brief. I am not sure if your Honor has been able to examine it. But perhaps I will have to argue factually on matters that are not in the record. I know no way of substantiating my factual argument without the evidence. In other words, we have made an allegation that there was publicity generated by the co-

operation and collaboration of the United States in this case.

We first filed a motion to commit the indictment predicated on that ground. We now make a motion for continuance of this action, predicated on that ground.

The Court: What I am trying to find out is, What are you after? Are you after a dismissal of the indictment? Do you seek protective relief so far as the trial is concerned?

Mr. Zeldes: We seek (1) a dismissal of the indictment; and (2) we seek that, in the event the Court does not see fit to grant that on the basis of the evidence that we are about to present, we ask in the second motion without any waiving any rights under the pending motion, to dismiss the indictment. The defendants move that these actions be continued for one year because of the widespread publicity that has been generated.

Now it seems to me the essential thing to do is to find out what that publicity was.

The Court: In the first place, so far as your motion to dismiss the indictment is concerned, are you willing to con-

cede that the indictment was returned by a Grand Jury before there was any publicity such as you claim?

Mr. Zeldes: Well, I believe the Grand Jury returned the indictment on October 6. And the publicity that I complain of commenced to be generated on October 8.

The Court: Subsequent to the time. Isn't that relevant to your motion to dismiss the indictment?

Mr. Zeldes: Not the sole basis, your Honor.

The Court: That is not what I asked. Isn't that a relevant fact?

Mr. Zeldes: Yes.

The Court: And you do concede it?

Mr. Zeldes: Let me say this. It is relevant if we were moving to dismiss because of a prejudicial Grand Jury, but we are not moving that. We are asking this Court to invoke its supervisory powers over a Federal official. I don't like to just make statements because I want to present them in an accurate context. If the Court desires—

The Court: I think you ought to go ahead, as I have said
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several times. Make your argument, although you may have to assume facts; because I do strongly insist that I want to see where we are going, what the issues are, before I permit the process of this Court, on a short calendar or motion calendar, to be invoked.

I recognize the power of the Court to do so. And as I said before, I not only will grant you leave to do so but I would take the initiative in insisting that evidence be taken provided I am convinced that the issues raised require it.

Now I think you should go forward, therefore, and state what further grounds, if any you have, for alleging that the indictment should be dismissed, and what further grounds, if any you have, that the defendants whom you represent cannot have a fair trial. I assume that is what you are getting at.

Mr. Zeldes: That is one of the bases of it, your Honor, but that is not the sole basis. It is bottomed partly on this Court's supervisory powers over Federal officials in the conscious generation of publicity. I think perhaps the most effective way to begin would be to read the press release

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that the United States issued to members of the press concerning this action.

The Court: That is the release attached to the Government's memorandum?

Mr. Zeldes: Yes. I assume it is the same copy which the Government informally gave me. There is no copy attached to it.

The Court: I think it will save a little time in the record if I read it, since I have not had an opportunity to, myself.

(The Court examined paper.)

The Court: Very well. The record will note that the Court has read the document attached to the Government's memorandum in opposition to the defendant's motion to dismiss the indictment, the document being headed, quote, "For Immediate Release", etc.

Mr. Zeldes: I don't know if this is the way to proceed, your Honor. I think it should be noted that this was a document prepared by the United States prior to the institution of the raids of October 8—for release to the press. Here again, I find myself in the position of making statements.

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And if your Honor wants at any time to challenge the statements, I will have no alternative but to proceed—

The Court: No. I suggest you go right ahead the way you are. I recognize the caveat you have thrown out. I will hear Government counsel in opposition. Maybe some of this can be conceded. And if there are critical issues that have to be resolved, there are ways of doing that.

Mr. Zeldes: I hope your Honor will bear with me if my procedure is somewhat stumbling, because I did not anticipate this particular approach.

The Court: You are too good a lawyer, Mr. Zeldes, to be thrown off by an unorthodox Judge.

(Laughter.)

Mr. Zeldes: I think perhaps one place would be to start with the events of October 8, if your Honor please. It is the position of the defendants in this case: The United States has cooperated and consciously generated publicity to the detriment of the defendants, and that this—based on the Court's supervisory powers, based on the due process clause, and based on the fact that the gambling laws are

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reserved to the States to enforce—together, is justification to dismiss this indictment.

Let us look at the facts for just a moment. Your Honor has seen the release referred to, by the Government. Just let me emphasize the first paragraph:

“In a spectacular thrust at the extensive gambling activities in this area”—

The Court: Mr. Zeldes, I don't want to interfere any more than I already have. But I have read this memorandum, this press release. And I do think I can read. And I don't think it is necessary to further load the record with it. You directed my attention to the first paragraph of it and I observe it.

Mr. Zeldes: Then I think perhaps we should go to the events of October 8 and see how the publicity, that was created, *was* created.

The Court: October 8 was the day of the raids?

Mr. Zeldes: Yes, your Honor. Before this raid commenced, newsmen—I don't know exactly how many—I do seem to have information to indicate several—were called together by a representative of the United States to meet

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in a private law office in the City of Bridgeport.

My best information indicates that at least some of them were in that private law office awaiting word of big news at about 1 o'clock on October 8.

And I caution again that I am stating evidence in the record at your Honor's request.

At approximately 1 o'clock.

The raids apparently commenced about 1:15 or 1:20.

That same afternoon at 3 o'clock this newspaper rolled. It's a banner headline in 84 point type: "Forty business places are raided in gambling crackdown here".

Two-line banner head, 84 point type.

For significance of news evaluation I show you the one-line 84 point type on Johnson's election as the President of the United States. (Laughter.)

How does it happen that a newspaper that goes to press at three o'clock can arrange to have this banner headline?

We know, your Honor, that the reporter for this paper

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was in the office, a private law office in Bridgeport, waiting word for this, between 1 and 1:30. That we know. Others were there, too.

And then newsmen were summoned to Middle Street. And photographers were there. The people started coming in to be booked, your Honor, and there is a photographer waiting. Here is a picture of one client. Here is a picture of other people. They are all there waiting as they come in, coincidentally.

These are papers I would like to present in evidence, if your Honor please, because the photostats didn't pick them up.

Mr. Newman: I object to that being offered at this time, your Honor. I assume it is being offered.

The Court: I have already ruled I am not receiving any evidence. I am just going to have to ask counsel to follow the ground rules I have laid down. The Court *can* take judicial notice of certain things. I have looked at what you have.

But what I am really getting at, Mr. Zeldes, and I don't want to appear to be acting as a tyrant here. But I want to know what your ultimate relief is sought, what you are getting at. —158—

I understand all this. I wasn't born yesterday and I do read the newspapers.

But after all, we have a court to administer. We have got cases to try. And I have got to decide on the basis of what has been presented here—will be presented—among other things, how the administration of criminal justice should be conducted in this court. It really isn't very helpful to me to be looking at photographs taken at the time of the arrests.

I have to weigh, among other things, if you make a sufficient showing, whether there ought to be a change of venue, whether there ought to be a continuance, whether this can be handled by cautionary instruction to the jury.

I think if you can get to the guts of the thing without these courtroom flourishes, that may be intended for others than the Judge—I am just a little apprehensive that maybe you are not addressing yourself to the Court but to others who may be in the room.

Mr. Zeldes: I am not, your Honor. I hope you don't get that opinion. I am directing it to you and I think these facts— —159—

The Court: I am sure I know you well enough to know that you would be reluctant to do that wittingly. But I do want to find out what you are getting at. What do you want me to do?

Mr. Zeldes: Here is what I want you to do, your Honor. I want you (1) to dismiss the indictment on the basis of the

factual I am about to present. (2) If you feel that that is not in order—and I am not the first counsel to ask for alternative relief—I request that, because of the conscious generation of publicity in this matter, this case be continued for one year. I urge the Court to realize that this is not the situation, not the situation where you have the free play of a free press inquiry for news, weighed against the rights of a fair trial. This is the situation where the United States has actively participated in the creation—just the headline, your Honor—“Gambling raiders seize 45 here. Syndicate broken, United States Official says”.

It seems to me, your Honor, that we have a situation—
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and I am going into one other factual thing—that involves the sanctity of the Grand Jury order sealing the indictments. And it seems to me that that is something the Court should inquire in. And I think perhaps I should mention it and back track to October 6; because on October 6, if your Honor please, you sealed the indictments till further order of the Court. I can only assume that you were acting at the Government's request pursuant to Rule 6 which authorizes the sealing of an indictment for purposes of apprehension of the defendants.

Your Honor I have evidence, and I have requested other evidence, to indicate that some of the defendants were not arrested till 3:30 or quarter to four. Yet, for some strange reason, at the request of the Government, at 2:36 on October 8 the indictments were made public—2:36—just twenty-four minutes prior to the deadline that had to be met on this paper.

And this paper, if your Honor please, which went to press at 3 o'clock on October 8, had the names of two defendants that were not arrested till 3:30 or quarter to four. One was

identified as a kingpin or a key official. I forget the terminology used. Another was not identified in any noteworthy fashion.

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So what do we have here? I say again we have conscious generation of publicity by the United States. And basically, I think the decision is this. Are we going to have the Department of Public Relations or the Department of Justice?

We are dealing here, if your Honor please, with a misdemeanor. Our clients were arrested, indicted by the Grand Jury for a misdemeanor, for failure to pay a \$50 tax. It so says in the bill of particulars. And this is the headline.

Your Honor, these men, most of the defendants, mine included, own property. There is a procedure to commence a prosecution by a summons where you send out a letter and come in.

But if in the orderly course of the day the United States would have sent out summonses at the rate of ten a day and they would have come in staggered, what would have happened? On page 87 you would find that somebody was arrested for a Federal misdemeanor.

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In none of those papers, if your Honor please—in none of those papers is it even identified that we are dealing with a misdemeanor. The predominance is on gambling.

I think perhaps the best way to illustrate this is to go through and read the quotes that are set forth in our motion. I thought perhaps I detected an indication a moment ago that you didn't desire me to do that. I will—

The Court: I think you can assume I have or will read what you have got in your written documents.

Mr. Zeldes: But they are not there, if your Honor please. I mean all of the material isn't there. We have the reporters under subpoena. They are here.

Assuming, arguendo, that the motion for full dismissal isn't granted by your Honor, there is no question that this is relevant to a continuance. And until you know the breadth of the publicity, how can there be any determination of whether you should give a continuance?

There is no real Federal policy that justifies the sealing and unsealing of an indictment, which is really geared for

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publicity purposes rather than for apprehension of defendants.

And why was this released at 2:36 when the defendants were not apprehended for another hour? Was it because at about 2:25 there was wet in type a statement about Mr. Costello, that would soon be on the streets? Does the Government deny that Mr. Costello heard his arrest on the radio before he was arrested?

I should perhaps say a word about the release itself, and particularly in view of the Government's brief; because there is a clause in the Government's brief that is very telling, your Honor. They say, "These representatives of the press were given no information until all arrests had been made or attempted to be made."

Now who would have suffered if those indictments were kept sealed until the next day, till Costello and Verrilli were arrested? Who would have suffered?

Somebody's face would have been red while this was on the streets at 3 o'clock.

Rule 6 says that an indictment can be sealed for apprehension of the defendant. There is nothing to even suggest

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that indictments can be sealed and unsealed to meet deadlines of metropolitan daily newspapers, pressing deadlines.

And I think that the telling mark is in their brief. It says, "These representatives of the press were given no information until all arrests had been made or attempted to be made".

What is the significance of "attempted to be made"?

Is the Government saying, "Well, we tried to get them at 2 o'clock with the others but for some reason we missed them. But it was more important to open up these indictments for the press deadlines than it was to apprehend the defendants."

The words are there, themselves. The Government writes, "or attempted to be made".

And then the Government says in their brief or in the affidavit—I don't know which—"There was no discussion of any evidence"—no discussion of any evidence.

But in the release, page 2, if your Honor please, it points out that the United States Attorney noted that not one individual in the Bridgeport area currently holds an occupa-

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tional tax stamp. Isn't it an element of this crime that that is something the Government must prove in this courtroom? Don't we have a right to cross examine anyone who makes such a statement?

A representative of the United States announced to the press not one individual in the Bridgeport area currently holds an occupational tax stamp.

Would it be so terrible if the gentlemen of the fourth estate had to look up their own records?

And later on, if your Honor please, the criminal records of two defendants were issued to the press, according to the press.

I am not concerned whether they could have been dug

out of Mr. Earl's records for ten years ago or fifteen years ago when Adrian Maher was the U. S. Attorney.

I am concerned how it made this headline, how we got a headline with 84 point type, two lines, on a misdemeanor.

And let me say one other thing, your Honor, in connection with the whole planning of the raid, because I think it is significant: I don't have all the dates in front of me.

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But our clients, some of them, I believe, were arrested in, let's say, July 16 and September 2. Mr. Garamella was charged with having taken bets on those days. The latest one was September 2, your Honor.

The bill of particulars conclusively proves that the Government's case is predicated on undercover agents making bets. That is their claim. There is no question. They named the agent. They identified him in the bill of particulars.

The last bet was placed September 2 with Mr. Garamella, according to the indictment.

On October 8, swooping in—swooping in, to use the words of the United States, they ripped out telephones, they took money out of the defendants' pockets.

It is going to be very significant, if your Honor please, that a man on October 8 had \$280 in his pocket. And they are going to try to tie that in with a bet on September 2.

Your Honor, this whole program was conceived to generate massive publicity. And it is an infringement of the 10th Amendment for this reason: The United States, per-

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haps, does not have faith in the local law enforcement agencies. But that does not give to the Attorney General of the United States or the United States Attorney in this

District the power to enforce the gambling laws. And this is a thinly veiled guise to do just that. It is significant. One of the newspapers said this, if your Honor please, which I think is very important:

"A Treasury spokesman said that it is not the policy to notify local police in advance of the raid."

That's a quote almost verbatim, I believe, from one of the papers.

But here we have a policy of the United States of America to summons reporters and hand out this with swooping and spectacular thrusts in advance of a raid, whereas they will not tell the local officials, according to the newspapers.

I ask simply this, your Honor. If they wanted to charge my clients with a crime, let them charge us with a crime. Let us try it in this courtroom or some other properly designated courtroom.

But is it necessary to have this material in the newspaper? Is it necessary to have a United States Attorney,

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being interviewed on the paper the next day, talking about the crying mothers who phoned up and said, "Oh, at last my husband won't gamble"?

Is that a relevant statement to the enforcement of the revenue laws, your Honor?

I say this, your Honor. There is some indication that the relief I seek in the original motion of full dismissal is novel. There is no authority contra to that request when it is tied in with both the 10th Amendment as we have done here and the fair trial and the supervisory powers.

But setting that aside for one minute, the record that I can present to you today, is the record I would like to

present to you today, because all of these people are here under subpoena and are all hot under the collar. Some of them had been advised not to talk to me outside of the courtroom, your Honor.

I would like to know who advised them to that effect.

It seems to me that this record, if I am wrong on the first point—and the record is identical—at least justifies a good healthy continuance. And that is why I have asked

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that this matter be continued for one year.

Are we in some kind of assembly line justice, if your Honor please? When I came before your Honor for a plea I asked for thirty days.

"No", said the United States. "We can't wait thirty days. We have to get this moving."

The United States was ordered by you, if your Honor please, to file its reply brief with me and with the Court on Friday.

I got it this morning at 10 o'clock when this matter came up.

I am not complaining. They were busy and there was a holiday.

But the time schedule just doesn't make sense.

This is a misdemeanor. This is not an assembly line to reel through conviction.

So it takes six more months. The commonweal won't come to an end. We are dealing with \$50 of the Treasury.

In some of these stories certain people were identified as key figures.

Certain statements were made by Government officials:

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"Gambling is wide open."

"Authorities said Bridgeport was selected as the target for the crackdown because of extensive gambling in the city".

The Court: I have read your motion paper. I assume these are quotes from your motion paper?

Mr. Zeldes: No. Those are ones from the newspaper that I just read.

Here is one other that is not in my motion paper, that I think is significant, your Honor, just to show you the type of publicity.

And it related only to prejudice—stuff that could never come in in a trial.

"Authorities said that based on the \$27,000 seized in the raids yesterday, the Bridgeport gambling operation involved gross receipts of more than one million dollars a year."

Your Honor, one of my clients was arrested with \$285 in his pocket on October 8 that somehow the Government claims related to a bet he might have taken on September 2. On the basis of that type of information they have implanted in the community, the entire state of Connecticut, that there is a million dollar gambling ring going on down
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here.

I really don't know what else to say without going forward with the evidence. But I should think this, your Honor, that, regardless of this Court's view on it—and I think that I have made a compelling reason to justify at the minimum a continuance we request—certainly we cannot tolerate this assembly line justice where liberty is at stake. I think that we have an absolute right to place this material in the record.

And the way it now stands it is a little bit not clear. Your Honor may have read the papers at your home in Darien.

But when another Court reviews this, and when another Court, unfamiliar with Connecticut, views this in terms of the 10th Amendment, what will our approach be if they don't have the newspapers in front of them; if they don't have the papers to compare Mr. Johnson's victory over Mr. Goldwater—compare it to the apprehension of the gamblers?

And let me just point out one other, your Honor: "City gambling machine smashed."

We are not dealing with the gambling laws. We are
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dealing with the revenue laws. This is a misdemeanor, your Honor.

Can we get a trial?

I come back to the point that I made before, your Honor, and it is simply this. I am well steeped in the tradition of the First Amendment. I know the rights of a free press. I know the dilemma that is posed for the press in the coverage of trials.

That is not what is at stake here. We are not dealing with the fair trial vs. the First Amendment. We are dealing with one thing—the Department of Justice versus the Department of Public Relations. I think the Government has elected, if your Honor please, to pursue the former course, and forfeited their right to use this courtroom after creating massive publicity that could have only been generated in the procedures that they followed in manipulating the unsealing of an indictment, in issuing the press release, in summoning the press into a private office in

Bridgeport to await word for the raids to open; in having reporters in front of the Revenue Building with cameras so that after defendants come in they can have their pic-

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tures taken and put on page 1.

And I do make this claim, your Honor. I have a scientific expert to offer on the effect of this publicity. I think it will be significant as an aid to the Court. He is here. I wanted to put in the evidence first and then have his testimony.

It seems to me that I have made the prima facie showing and ought to be allowed to proceed.

The Court: Well, I am going to hear the Government in opposition.

Do I understand, Mr. Zeldes, your argument you have just made is in support of the defendant's motion to dismiss the indictment in both the Grassia and Garamella cases?

Mr. Zeldes: Yes, your Honor, and also in support of the motion for continuance.

The Court: In support of all motions that you filed in both of these cases?

Mr. Zeldes: Yes.

The Court: Other than the bill of particulars?

Mr. Zeldes: That is right. I might add that, under your Honor's instruction, I think the only motions I was ordered

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to have filed, on the day that I filed them—and I met that deadline, were motions directed to the indictment.

The Court: Well, I am not sure what you mean by that. I certainly intended, by that direction, and the direction in all cases, that all motions of whatever nature in these

cases should be filed within the limits indicated, so that I could have them before me and rule on them at one time and get on with the trial of the cases.

Obviously, there are other claims, such as jurisdictional claims, to be raised at any time. But I did not contemplate, and I do not now, any delayed sequence in filing of motions. And I might say that any motions that have been filed without permission, without prior leave having been obtained from the Court, will not be considered in these cases.

Mr. Zeldes: That would not include, would it, your Honor, Rule 16 and 17 motions? I assume that you didn't include those—discovery type motions?

The Court: I assume all motions were to be made—Rule 16 and 17.

Mr. Zeldes: Perhaps in this—

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The Court: Obviously, if these cases are set for trial in less than two weeks from now, it would seem to me to be elemental and proper administration of justice that all motions be filed when directed so that the Court could devote, as I have, a day to the hearing of the motions and whatever time is necessary to deciding them. I do not anticipate entertaining any further motions after this time.

Mr. Zeldes: Well, perhaps—I think when your Honor views the matters that we have presented you might feel somewhat differently, at least on the matter for continuance.

And then if I misinterpreted your prior order—I didn't think there was any reference to discovery motions. I thought it was motions directed to the indictment.

The Court: What is a bill of particulars motion?

Mr. Zeldes: It is directed to make the indictment more specific.

The Court: Well, so there will be no question about it, the order that the Court made at the time pleas were entered in these cases, that all motions should be filed on or before a specified day, accompanied by supporting briefs

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and affidavits, followed by the filing of opposing briefs and claiming the motions for argument on November 16, that are now before the Court on November 17, that order was intended to cover all motions, which is just what was stated. And I am going to adhere to that order rigidly, which is necessary in view of the number of cases involved, the number of defendants involved, the number of counsel involved.

I think it is only fair to all counsel to be treated uniformly. That is the way it will stand anyhow.

I will hear the Government in opposition to the defendants' motions in Garamella and Grassia.

Mr. Newman: If your Honor please, I am not overwhelmed by the ferocity of the argument that is being addressed to the Government's conduct in this case. Defendants have leveled a very serious charge at the Government and in particular the office of the United States Attorney. Their papers allege that there has been a concerted effort by the United States Attorney's office to conduct a trial by newspaper and for that reason they ask that the indictments be dismissed.

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As our opposing memorandum points out, there is no statement that I am aware of, alleged by these defendants, either in their written or oral presentations, that alleges that, as to the particular defendants here involved, any representative of the Government divulged any of the evi-

dence which the Government intends to produce against these defendants; that no statement was made as to the guilt of these defendants and that no statement was made as to any prior criminal record of these defendants.

Now as I read the papers and listen to Mr. Zeldes' argument, the nub of his complaint, and his very serious claim, of trial by publicity, boils down quite simply to the fact, undisputed by the Government, that representatives of the press were given advance notice of the fact that arrests were likely to be made in the City of Bridgeport on the date in question. And I am fully prepared to defend the Government's right to give that information to the press. I want to be very clear with the Court about it.

There was a plan to make a series of arrests on a single

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day. There is no question about that. The Government does not deny it. I don't know of any authority that says that a defendant has a right to be arrested on a day of his own choosing. If the Government wishes to arrest a group of people on the same day where similar conduct is involved, it seems to me that is the Government's absolute right. And experience has shown that the Government is quite wise in seeking to do that, wise in the sense of making their arrest effective, of preserving evidence, and generally enforcing the laws of the United States.

Now as to the specific issue of whether the press could be notified ahead of time, it seems to me that issue is quite clear also. In any large-scale operation of this sort there is always a likelihood that information will be prematurely released. The release of that information prematurely might well defeat the entire administration and enforcement of justice and the enforcement of these statutes. And

therefore in this case, as has been done in other jurisdictions, the press is notified ahead of time in confidence of the likelihood that a series of arrests will be made. They

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are not told who is going to be arrested. They are not told where the arrest will be made. But they are told that there is a strong likelihood that there will be legitimate news available to them at the appropriate time. That was done in this case.

Now while defendant's counsel makes a great deal of saying that the reporters and all were placed in one location, it seems to me that is the obvious way to do it. I don't think we should have them scattered all over town. It seems to me the most prudent possible way to handle it is to tell the reporters that there will be legitimate news, to suggest that they be at one place where they may find out about the news when it's appropriate that they know about it, and then, when it is appropriate, to tell them the fact of the arrest and the charge and the nature of the proceedings.

That is the essence of this claim, it seems to me, is that they *were* notified ahead of time. And I think the Government has an absolute right to do that. And I don't think that any evidentiary basis is needed to establish that they were notified ahead of time, because the Government is

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quite willing to concede, and the record may show, that they were notified ahead of time of the likelihood of an arrest.

The complaint that the defendants draw out of this conduct of the Government is that there were large headlines in the local press saying that a group of defendants were

arrested. And again we need no evidentiary hearing on that basis because the Government is perfectly willing to concede that the fact of the arrest was given extensive publicity, as well it might have been. A number of people were arrested. There is intrinsic news value in the fact of arresting this number of people. And while defense counsel may make light of the fact that the tax involved is only a \$50 amount, surely that does not in any way go to the issue of the newsworthiness of the arrest. In any event, that would be a judgment for the press and not the Court.

But it seems to me the press is quite within its bounds in giving publicity to violations of wagering laws.

Now while defense counsel suggests, if not maintains,

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that we should close our eyes to the issue of wagering and look at this purely as a taxing matter, the fact is we are enforcing a wagering law tax. It is denominated as a wagering tax in the Internal Revenue Code; so there is no secret about that. And I don't think the fact that we talk about it as a wagering tax in any way impedes the Government's right to enforce the penalties for nonpayment of that tax, regardless of whether it is \$50 or \$5,000. It is a tax, due and owing, of people who choose to enter the business of wagering. And if they are arrested for not doing that, it is legitimate news for the local press that they *were* arrested for not paying a tax required of those who choose to be in the business of wagering. And that's the law. And the facts surrounding the arrests are not disputed by the Government.

So, we have the issue of the press being notified in advance. As to that, we say that we have every right to notify them, and that no prejudice of which these defendants may legitimately complain arose out of that.

There has been no discussion of evidence relating to these defendants, no statements of prosecutors or other Gov-

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ernment agents as to the guilt of these defendants.

The publicity attended the fact of the arrest. It was given extensive publicity. There is no question about that. But it seems to me that that is a right of the press to decide the inherent news value of a series of arrests of this size. And I don't see where the Government has any cause to be the least bit concerned about letting the press report legitimate news.

Now were there any allegations here that evidence as to the guilt of these particular defendants was discussed with the press, that would be an entirely different matter. But I have read the motion, and I don't see why we need any evidentiary showing beyond the motion because the motion itself asserts what the defendants would like to prove. And there is nothing in the motion that talks about evidence of the guilt of these defendants being discussed by the Government with the press.

Now finally, we come to the statements in the press release itself. At this point, as I want to be throughout this,

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I want to be entirely candid with the Court. As the Court may know, this press release was issued prior to the time that I was associated with the United States Attorney's office. In terms of the internal administration of the office of the United States Attorney I am not prepared to say whether every single statement in that press release ought to have been made. But I repeat, I say that I have some indecision in my own mind only in regard to the internal administration of the U. S. Attorney's office.

On the issue which concerns this Court and which is before this Court, namely whether anything in that document justifies the dismissal of this indictment, I have no hesitancy whatsoever to represent to this Court that nothing in that statement in law justifies the dismissal of this indictment. Nothing in that statement involves the discussion of evidence or the guilt of these defendants in the type of prejudicial way which could even come close to raising an issue as to dismissal.

Now I understand that counsel is now seeking, as an alternative remedy, to ask for a continuance. And on that

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issue I would simply say that again the motion, taken as pleaded, raises no issue justifying a continuance. The publicity that counsel complains about is publicity of the fact of the arrest and not of evidence that might have come to the jury's attention prejudicing them or potential jurors in their ability to make a fair determination of the facts. Furthermore, if there were any doubt in the Court's mind, based on the matters pleaded, regardless of what might be proved, but based on the matters pleaded, it seems to me then the proper remedy for counsel to request would be to have this matter heard perhaps in Hartford. But as I understand it, at the time the defendants were put to plea in almost all cases—I believe in the instant case—the request was made to bring the cases here to Bridgeport.

Mr. Zeldes: Not true in this case, your Honor.

Mr. Newman: It is not true in this case?

Mr. Zeldes: No.

Mr. Newman: Well, I am sorry, then. I understand it was true in most of the cases that were made.

The Court: My recollection is that of the forty-eight or forty-nine pleas of not guilty that were entered before me, requests were made by or on behalf of all counsel to have cases tried in Bridgeport except I know there were one or two either made no request or a request that they be tried in Hartford.

Now were you one of those?

Mr. Zeldes: Your Honor, you may recall I reserved the right to urge your Honor to place another place of trial, and also whether or not to be tried by Court or jury. That determination has not been made in this Court yet. I reserved the right at that time.

Mr. Newman: I would say, your Honor, I would have no objection whatsoever to this case, if counsel so chooses to move it, if the Court wishes to accede to it. I would interpose no objection to this case being tried at Hartford.

I don't suggest that there has been any showing of the type of prejudicial publicity which justifies any relief whatsoever. Nevertheless, I wouldn't object to a hearing

in Hartford. But there clearly has not been the type of publicity, whether Government-generated or otherwise, that justifies dismissal or continuance. There has been no issue, no discussion of the type of evidence that will be presented against these defendants, of their guilt or of their past criminal record.

There was a statement made by counsel that someone discussed the past criminal record of some defendant. I didn't take him to say that that was done in his case. I am not aware of that being done. I am not aware of that being done by any representative of the United States

Government. But I don't think I can pursue it since I am not aware that defense counsel is pursuing it as to his defendants. But if there is such an allegation as to other cases, then of course I want to know about it and find out about it. But I can't say more about it because it isn't being raised in these cases.

Now counsel in his motion has raised issues going beyond the issue of publicity. He has raised 10th Amendment issues and he has raised self-incrimination issues. I don't know what your Honor's pleasure is, whether you

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want those pursued at this point or whether counsel wishes to pursue them or what, or should we stay with the publicity issue at this point?

The Court: I believe Mr. Zeldes at least made some reference to the 10th Amendment argument, I don't remember hearing anything orally stated at the time—

Mr. Newman: Well, I would be glad to take just a minute more to wrap up the entire thing, then. As I understand his 10th Amendment argument from his papers, it is that, while the statutes may be valid as a legitimate exercise of the taxing power, as the Supreme Court held in the Carver case, their enforcement in the circumstances of this case is barred by the 10th Amendment. Now it seems to me that the argument falls of its own weight; that you can't fairly say the Government has a right to assess a tax but does not have a right to prosecute for nonpayment of the tax. In this case the prosecution is for nonpayment of the tax and failure to file the registration statement incident to the obtaining of the gambling tax stamp.

The fact that the tax is a condition precedent to entering into the business of gambling is a fact of life and part of the law of this land. And if these defendants are adversely affected by anyone reading about the fact that they were arrested for not paying a gambling tax, that's part of life, and I don't see where the Government or anyone else need be the least bit remorseful that there was publicity of the fact of an arrest for that particular violation, or indeed of the fact that forty-five people were arrested the same day for that same violation.

That happens to be the law they stand accused of violating. We are prepared to prove they did violate it. The fact that there was publicity in connection with the arrest, it seems to me, is nothing the Government need take umbrage at. We say there is no issue as to the publicity, that it is not the type of publicity, generated by the Government or in the community in general, which would prejudice these defendants in securing a fair trial.

And on the very serious charge that the Government's own conduct is so objectionable as to require dismissal or any other remedy—it seems to me there is a total failure

to substantiate such a very serious charge. The nub of the allegation in regard to the Government's conduct is simply prior notification to the press of the likelihood of arrests.

I am personally prepared to defend the Government's right to do this. I see no justification for giving these defendants any relief because of the Government's conduct in letting the press know that there is going to be a legitimate news story which they may report in a full, accurate way—and not in a premature way, which often happens when the

press is not put on notice of the likelihood of this type of incident.

Mr. Zeldes: May it please the Court, I think there are several—both omissions and errors I would like to point out that I think are quite significant: First, as to the type of publicity concerning the evidence that will be adduced at the trial, by the very nature, your Honor, of things, we are concerned with not just the elements of the crime that they can establish in the courtroom but what they saturated in the press, your Honor, that they never would be allowed to use, on Friday, the day after the arrest—Saturday; I am

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sorry, your Honor.

“Housewives voice thanks for gambling crackdown. ‘Thank God you finally broke it up. My husband’s gambling has ruined our home!’ Gratitude voiced.

“This remark was more than one of a dozen emotional expressions of gratitude voiced by housewives who contacted Howard T. Owens, Jr., Chief Assistant U. S. Attorney, in the wake of the gambling raids by Treasury agents and State Police on Thursday.

“‘Some of the women even cried as they told me how gambling by their husbands had caused them continuous hardship,’ Mr. Owens said.

“Meanwhile, Treasury agents indicated the crackdown on gambling activities here and the arrest of 45 persons on charge of failing to purchase federal gambling”—

The Court: (Interrupting) Mr. Zeldes, I really think you are imposing on the Court. I don’t like to say that you are, but I have been asking you for more than an hour now—if you are going to start reading the newspapers the Govern-

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ment is entitled to read in rebuttal. And I really don’t think

it advances the matter one iota. I have got the issues clearly in mind and I don't think I need any more reading material to clarify it.

Mr. Zeldes: Can I ask question, if your Honor please, particularly in regard to the motion for continuance? And this goes to one of Mr. Newman's matters that he did not mention.

In their brief they say the appropriate remedy would be by motion for continuance.

Now we have made the motion for continuance. The evidence is here ready to go in the record.

How can the Court—and I of course ask this rhetorically because I have no power to compel an answer—how can the Court analyze the nature of publicity without having the publicity before the Court?

And one other thing I think is important that was not enlarged upon by the United States. I pointed out to your Honor that the unsealing order was filed at 2:36 P.M. I also pointed out to your Honor that the deadline in the Bridgeport Post is 3 o'clock for that afternoon edition.

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I have spoken with a reporter who has told me that he had everything necessary to write his story by about 2:10, twenty minutes before this was unsealed by your Honor's order. His story contained the names of people who were not even arrested when he wrote it.

And one other thing, your Honor. Mr. Owens says nothing about their being convicted.

If they mention convictions of co-defendants, that creates publicity as to all defendants in this dragnet, which was one of the points we mentioned.

Mr. Owens said Costello and Marchetti had previous convictions for income tax violations. That answers Mr. Newman's point on that, on the point that there was no discus-

sion. I point out the very press release—United States Attorney Eagan noted not one person in the Bridgeport area currently holds an occupational tax stamp. ..

I urge your Honor to analyze the lead in that release, the first paragraph of that release. The connotative words in there are something to behold.

I think, from your Honor's opinion in the Vermont case that you have—

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The Court: In which I was reversed.

Mr. Zeldes: But if you recall, in that reversal, if your Honor please, the Court of Appeals for this Circuit said, if we were dealing with a Federal criminal prosecution we would compel reversal.

And what I am asking for now is to make the record so we can have the evidence for a determination. It seems to me the Government has not in any way justified seeking your Honor's permission to open up that order at 2:36 P.M.

In so far as we are dealing with the 5th Amendment, if your Honor please, and the 10th Amendment too—I am not sure of the status. But your Honor had entered a specific order the Government's brief was to be filed on Friday. It was not filed on Friday. So I should think we would be allowed the four or five days to reply to it that we would have if they had filed on time.

Strict filing seems to be required of the defendant. It seems to me we shouldn't have a double standard apply to the United States.

The Court: I don't recall I provided for reply briefs at all.

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Mr. Zeldes: You did, your Honor. You said mine to be filed on the 10th, the Government's reply on the 13th.

Mr. Newman: And that is all.

Mr. Zeldes: No. But I would have had a chance to look it over. I just got it this morning. And to cite your Honor authority, I would have obviously had an opportunity to file a reply brief this morning.

The Court: Under the circumstances, I will give you twenty-four hours in which to file a reply. If you will have it in by four o'clock tomorrow afternoon I will take it into account.

The Court will reserve decision upon the pending motions on which I have not ruled in the last three cases on today's motion calendar—in the Christiano, Grassia and Garamella cases—including the applications of counsel in each of these cases to take oral evidence or to present evidence, oral and documentary, in support of their respective motions. The Court will make a determination, of course, on that application before ruling on the merits. Depending upon how the Court rules on that application to take testimony, I may or

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may not be in a position to rule on the merits.

Mr. Zeldes: May I make one further inquiry?

The Court: Yes.

Mr. Zeldes: As I said before, I have a number of people under subpoena. These people will not voluntarily come to Court at my request, all of them.

The Court: Well, I don't really see that I have any power, and I do not believe I am justified on what I have heard so far, to order continuance of the subpoenas. It is counsel's responsibility, of course, in subpoenaing witnesses to be heard on a motion calendar.

That is entirely a matter within the Court's discretion. I did, this noon, order those witnesses who had been subpoenaed and who were in the courtroom to return this after-

noon, not knowing what was coming. But I will not order any further continuance of the subpoenas.

If it becomes necessary to take any evidence, it may be reopened, even, if you wish to bring in the evidence.

But the short of it is I am not continuing *this* hearing for
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the purpose of taking evidence, and I am not ordering the witnesses to remain, who have been subpoenaed today.

Mr. Zeldes: May I ask one other question along this line, if your Honor please? And that is in relation to the status of the record, as we did have the people here. Can I state for the record the nature of the evidence we intended to offer, particularly with relation to the motion for continuance, so that there is no misunderstanding on the Court's part or on the record's part of what we are offering?

The Court: No. I think that is unnecessary. In the first place, I haven't ruled on the application to take oral evidence. In the event the Court denies that application, counsel *are* granted leave, in one week after denial of such application, to file a written offer of proof to indicate what they would adduce or seek to adduce if leave to do so were granted. Obviously, counsel have in mind—and I am directing my remarks to experienced counsel who enjoy the highest respect and esteem of this Court—counsel obviously understand that it would be physically impossible to ad-

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minister this court if the privilege or leave to take oral evidence of the sort which you contemplate on these motions were to be granted as a matter of course. There simply is not the judicial manpower available in this District to handle such things.

Accordingly, the Court must, in the exercise of its discretion, treat such applications accordingly. And as I say

repeatedly, I will not hesitate to take evidence when I believe it is needed. If it is not needed it will be an unwarranted imposition upon all concerned, including the Judges, to convert every criminal prosecution to an attempt to investigate the Department of Justice and the United States Attorney's office.

That is not in any way to reflect any decision of the Court, that I have made up my mind so far as the issues are presented. But I make the observation in passing.

I assume experienced, able and astute counsel realize that it is impossible for this Court to carry on the business of the Court if every motion calendared in effect is going to be

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converted into a hearing on evidentiary matters. It was never the intention of the Judges, in setting up motion calendars, to do so, any more than Judges in the State Court permit the taking of evidence as a matter of course in short calendars. It is a privilege to be invoked in the truly extraordinary case. And I have got to be satisfied this is the extraordinary case where that privilege will be necessary in the administration of justice and will not be abused.

Mr. Zeldes: May I just add one more problem, inform the Court of one problem?

As I said, we have a half a dozen or so subpoenas out for people who do not like spending the day in court. Although they are pleasant with me, they are concerned about their news sources, quite properly, as news men.

Would it be an imposition on the Court to require a week's notice on subpoenas? All these subpoenas will have to be reissued at considerable expense, provided we are to have a hearing. I would request we have four or five days to get the subpoenas out again. And it will mean double

the same expense we have.

The Court: Mr. Zeldes, I think you are about six jumps ahead of yourself. I have several things to decide. I am leaving it as it is. I will make no order with respect to any further evidentiary hearing of any of these motions.

I will state, simply because I don't think it is entirely beside the point, particularly since Mr. Zeldes has referred to it, has referred to a decision of mine in another jurisdiction in this Circuit, that while sitting in that jurisdiction, by the way, a practice was brought to my attention that I don't think is altogether irrelevant to some of the issues that are raised here today.

The situation was brought to my attention under these circumstances: In trying a criminal jury case I instructed the jury, as I customarily do in any case, particularly a jury case, to scrupulously refrain from reading the newspapers, not to pay any attention to anything about the case and if they see any headlines or any indication in the newspaper about the case on trial to refrain from reading it.

And the jury was thereupon excused for the day, whereupon I was informed by the Court officials that that was a rather unusual instruction to give in that District and that the reporter for the three papers involved was, and had been for many years, the law clerk to the Federal Judge.

And I was surprised at first. But upon talking to Judge Gibson about it afterwards, I am satisfied that that was an example of rather shrewd Vermont common sense.

He decided that the way to get the news story accurately and completely purged of any prejudicial material, was to release it himself, which he has done. And I think Gibson is one of the best Federal Judges in the country.

So I don't think that the source of news from one of the branches of Government necessarily makes it prejudicial. On the contrary, it may well serve to protect the interests rather than to jeopardize the interests of parties to the case.

Mr. Zeldes: Just one other thing, your Honor, and then I will shut up. And I know you are anxious to have me do just that.

MOTION TO STRIKE

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I would move that the Government's affidavits of Mr. Eagan and Mr. Owens be stricken from the record. It seems wholly unfair for the United States to be able to present by evidence their position on this matter and we are not allowed to proceed. If Mr. Owens and Mr. Eagan want to testify, then there will be a time for that. Self-serving affidavits, I think, should be stricken at this time.

The Court: I will deny that motion. I have granted parties on both sides considerable liberality with respect to submitting papers. And it is not my practice to require—much less encourage—attorneys to take the witness stand. I have had some experience in that regard myself, and I take a dim view of Government counsel on the witness stand.

Mr. Newman: If the Court please, there seems to be one matter still pending. I am just not sure. Perhaps it has been disposed of, but I would like to be certain.

Mr. Zeldes filed a motion—requested from the Court and received a subpoena duces tecum of a Treasury agent.

Now I understand that he is now released of his obliga-

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tion to be available for testimony unless subsequently served. But I am not clear of the effect of the order that is

upon him to produce. There was an order to produce at this place at this time.

I have a motion to quash that but I am not sure that your Honor wants to hear that at this point. I just want to be sure we don't leave uncertain as to the effect of the order to produce, as well as the order to appear.

The Court: Well, so there will be no question about it, the Court will order, in view of the fact that this hearing has been terminated—I have heard exhaustively all I intend to hear at this time, subject to the rulings that I have indicated I will make. I therefore am going to order that all subpoenas, including any subpoenas duces tecum, which have been issued at the behest of either side, be terminated. There is no further obligation on the part of any witness to appear or to produce any records in connection with the hearings in these cases. And if it becomes necessary at a future time to hold hearings, necessary subpoenas can be issued or reissued. All outstanding subpoenas have been

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fully satisfied and are therefore terminated as of this time.

Mr. Newman: Thank you.

(Hearing closed.)

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 823

JAMES MARCHETTI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 826

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1028 Misc.

ARTHUR GJANCI, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. J. App. 1a-15a) is reported at 352 F. 2d 848.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1965. Petitions for rehearing were denied on November 26, 1965. Petitions for writs of certiorari were filed by Marchetti (No. 823) on December 15, 1965, by Costello (No. 826) on December 16, 1965, and by Gjanci (No. 1028 Misc.) on December 18, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court should reexamine, in light of *Alberson v. Subversive Activities Control Board*, No. 3, this Term, decided November 15, 1965, its holdings in *United States v. Kahriger*, 345 U.S. 22, and *Lewis v. United States*, 348 U.S. 419, that the registration requirement of 26 U.S.C. 4412 does not violate the Fifth Amendment privilege against self-incrimination.
2. Whether this Court should reexamine its holding in *Kahriger* that the wagering tax provisions do not violate the Tenth Amendment.
3. Whether petitioners were entitled to a new trial because of pretrial publicity generated by their arrests.
4. Whether the questioning of petitioners Marchetti and Gjanci immediately after their arrest violated their Sixth Amendment right to counsel.

STATUTES INVOLVED

26 U.S.C. 4411:

Imposition of tax.

There shall be imposed a special tax of \$50 per year to be paid by each person who is

liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C. 4412:

Registration

(a) Requirement.

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.

Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.

In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

STATEMENT

Petitioners were convicted on separate two-count indictments which charged each of them with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational wagering-tax stamp required by 26 U.S.C. 4411 and by willfully failing to register as required by 26 U.S.C. 4412. Petitioners were also convicted on an indictment charging all of them with conspiring to fail to purchase the necessary stamp. All three petitioners received concurrent one-year prison sentences on the first count of their substantive indictments and on the conspiracy indictment. Costello and Marchetti were fined \$10,000, and Gjanci was fined \$2,500. Imposition of sentence on the second count of each substantive indictment was suspended and petitioners were placed on probation for two years. The court of appeals unanimously affirmed the convictions.

ARGUMENT

1. Petitioners' initial contention is that they were constitutionally privileged not to comply with 26 U.S.C. 4412 because that registration provision required them to submit self-incriminatory information on the prescribed Internal Revenue Form (p. 13, *infra*). This Court rejected the identical claim in *United States v. Kahriger*, 345 U.S. 22, on the grounds that (1) the privilege claim could not first be made in a criminal prosecution for failure to register (see *United States v. Sullivan*, 274 U.S. 259), and (2) the registration provision did not require a registrant "to confess to acts already committed" but merely in-

formed him "that in order to engage in the business of wagering in the future he must fulfill certain conditions." 345 U.S. at 32-33. The holding in *Kahriger* was reaffirmed in *Lewis v. United States*, 348 U.S. 419, a case arising in the District of Columbia, where the petitioner contended that the disclosure required by the statute would incriminate him with respect to federal offenses, not merely State crimes.¹

Albertson v. Subversive Activities Control Board, No. 3, this Term, decided November 15, 1965, does not require reexamination of *Kahriger* and *Lewis*. In distinguishing the *Albertson* situation from that in *United States v. Sullivan*, 274 U.S. 259, this Court observed that "to honor the claim of privilege not asserted at the time the return was due would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim" (*Albertson* slip opinion, pp. 8-9). It also noted that in *Sullivan* the privilege claim was "asserted in an essentially non-criminal and regulatory area of inquiry" (*id.* at p. 9). These distinctions apply to *Kahriger*, *Lewis* and the present cases as well as to *Sullivan*. The Court characterized the wagering-tax registration provisions in *Kahriger* as "directly and intimately related to the collection of the tax and * * * 'obviously supportable as in aid of a revenue purpose'" (345 U.S. at 31-32), and that distinguishes them from the individual registra-

¹ This Court also denied certiorari recently in a case in which a defendant's wagering-tax returns were introduced into evidence against him in a prosecution for violation of 18 U.S.C. 1952 (travel in interstate commerce with intent to carry on gambling activity). *United States v. Zizzo*, 338 F. 2d 577 (C.A. 7), certiorari denied, 381 U.S. 915.

tion requirement of the Subversive Activities Control Act—which, in light of the underlying determination of the Subversive Activities Control Board, would have served little, if any, purpose other than self-incrimination “in an area permeated with criminal statutes” (*Albertson* slip opinion, p. 9).

An additional distinction between these cases and *Albertson* (which was not, however, explicitly mentioned in the *Albertson* opinion) arises from the fact that the registration in *Albertson* touched incidentally upon constitutionally protected rights of association. Since membership in the Communist Party without knowledge of its unlawful purposes or intent to further them is constitutionally protected (see *American Communications Association v. Douds*, 339 U.S. 382, 393; *Noto v. United States*, 367 U.S. 290, 299–300; *United States v. Brown*, 381 U.S. 437, 455–456), compulsory disclosure of membership—with its hazard of prosecution—might deter lawful association. No such countervailing interest is involved when the disclosure pertains not to speech or association but to gambling. See *Lewis v. United States*, 348 U.S. 419, 423.

2. The claim that the wagering-tax provisions violate the Tenth Amendment was also squarely rejected in *Kahriger*. In *United States v. Calamaro*, 354 U.S. 351, 358, on which petitioners rely, the Court observed only that the policy of deterring gambling was essentially one of State concern and could not be invoked as a basis for extending the federal statute beyond its literal application. Neither *Calamaro* nor any other decision of this Court provides any support for petitioners' claim that the

personal motives of federal officials engaged in non-discriminatory enforcement of a federal statute may invalidate, under the Tenth Amendment, an otherwise lawful federal conviction.² Moreover, since State law prohibits the conduct in which petitioners were engaged (see Conn. Gen. Stat. §§ 53-271 to 53-279, 53-295 to 53-297), enforcement of the federal law did not conflict with a power reserved to the State of Connecticut by the Tenth Amendment; it merely "supplemented the action of" the State in forbidding commercialized gambling. Compare *Lottery Case*, 188 U.S. 321, 357.

3. Petitioners were indicted with thirty-five others in New Haven, Connecticut, on October 6, 1964. Bench warrants were issued and bail was fixed, but the indictments were sealed until further order of the court (App. C.A. 203a). The indictments were unsealed at 2:36 p.m. on October 8. At 1:20 p.m. on that date, those indicted, as well as certain other individuals charged by complaint, were arrested in

² Similarly, as the court of appeals held in a connected case (Pet. J. App. 23a), the trial judge did not exceed proper discretion by taking into account petitioners' violation of State gambling laws in imposing sentences which were within the permissible maximum for the misdemeanor charged. Marchetti's suggestion (Pet. 18-19) that reversal of the convictions is required by the judge's remarks in imposing sentence and his post-trial statement concerning the need for more effective law enforcement (App. C.A. 177a-186a) is unsound. The record discloses no conduct on his part prejudicial to petitioners during trial (compare *United States v. Marzano*, 149 F. 2d 923, 925-926 (C.A. 2)), and no post-trial remarks questioning the justice of prior acquittals from which an inference could arise that his trial conduct was motivated by personal animus against them (compare *State v. Nunes*, 205 A. 2d 24, 27 (R. I.)).

simultaneous raids conducted by 75 Treasury agents aided by 50 State policemen. A press release announcing the arrests was issued by the government prior to the unsealing of the indictments (App. C.A. 70a-72a). The release stated that the arrests "were successful in breaking up a large, syndicated operation including some of the most important higher-ups in the gambling syndicate," and that the "series of raids was part of the National crackdown on organized crime initiated by the Office of the United States Attorney General" (App. C.A. 70a). Petitioners, who were the only ones charged with conspiracy as well as with substantive violations, were specifically mentioned by name in the release (App. C.A. 71a).³ Newsmen were invited to Internal Revenue Headquarters to photograph those arrested as they were brought into custody, and the arrests resulted in extensive newspaper, radio and television coverage, particularly in Bridgeport, the area in which the raids had taken place (Pet. J. App. 8a; see App. C.A. 144a-147a). On the following days, the Bridgeport newspapers reported oral statements by the chief assistant United States attorney to the effect that the raids had "broken the back of gambling" in Bridgeport, that funds from gambling were supporting other illegal activities, that housewives had called to express their gratitude, and that Costello and Marchetti had previous convictions for income tax violations (Pet. J. App. 8a; see App. C.A. 148a-161a).

³ Costello and Marchetti, along with John Mento, received an additional mention because their bonds were set at higher amounts than were the bonds of the other persons arrested.

Petitioners were arraigned in New Haven on October 20. Costello and Gjanci requested jury trial in Bridgeport (App. C.A. 2a, 207a), and Marchetti registered no objection to being tried there. On December 3, the first day of actual trial, petitioners brought to the court's attention an article which had appeared in a Bridgeport newspaper on December 1, reporting that six suspected gamblers had submitted guilty pleas and that the chief Assistant United States Attorney anticipated that others would also so plead (Pet. J. App. 9a; see App. C.A. 141a). On this basis Costello moved for a mistrial (App. C.A. 208a), and Marchetti and Gjanci for a mistrial and a change of venue (App. C.A. 211a-212a). At the request of the government (App. C.A. 214a) and with petitioners' consent (App. C.A. 215a), the court inquired whether any juror had read the article, and received no response (App. C.A. 216a).⁴ The motions were thereupon denied (App. C.A. 217a).

Since petitioners failed, prior to trial, to move either for a change of venue or a continuance, and, indeed, affirmatively requested trial in Bridgeport (other than Marchetti, who acquiesced)—where the arrests had taken place and where the pretrial publicity was strongest—they effectively waived any objection which they may have had to such publicity. As the court of appeals held, "counsel could not

⁴The court also indicated a willingness, if any counsel so requested, to poll the jurors individually, stating that "[i]n the absence of request, the Court will assume that the jurors' silence in response to the inquiry that I put to them is satisfactory to counsel on both sides." There was no request for an individual poll (App. C.A. 217a).

speculate on a favorable verdict and then claim lack of 'an impartial jury' when the gamble failed" (Pet. J. App. 9a). Marchetti's and Gjanci's belated oral motions for change of venue were based upon a single newspaper story which appeared after the jury had been selected. The court inquired regarding the effect of that story and concluded that it had not been read by any of the jurors and that it did not, in any event, pertain to any of the petitioners personally.

4. Marchetti was arrested in the diner which he owned (App. C.A. 272a), and he was then advised "of his constitutional rights." The arresting agent took him to a booth in the dining portion of the diner and interviewed him over a four-hour period (App. C.A. 271a, 288a). Marchetti admitted knowledge of the wagering-tax stamp requirement but said that nobody buys them and "I pay enough" (App. C.A. 272a). He also claimed that he did not work for anyone, but "took all the action himself" (*ibid.*). In his presence, his answers were recorded on an interview sheet which he reviewed and signed (*ibid.*; see App. C.A. 143a). At petitioners' trial, the agent's testimony regarding the conversation was introduced without objection, and the interview sheet was similarly admitted into evidence against Marchetti only (App. C.A. 273a).

Upon Gjanci's arrest, he was also warned of his right not to answer incriminating questions, and was then asked if he had purchased a wagering-tax stamp. He replied that he had not. He was then asked why, and he replied that he did not accept wagers but merely played the numbers himself. This testimony

was also received without objection (Pet. J. App. 14a-15a).

By failing to object when their statements were offered in evidence, thereby giving the judge no "opportunity to correct the error and thus avoid the necessity of further proceedings, possibly including a new trial," petitioners waived their right to raise the objection on appeal and in this Court. *United States v. Indiviglio*, 352 F. 2d 276, 280 (C.A. 2), petition for certiorari pending, No. 821, this Term;⁵ see also *On Lee v. United States*, 343 U.S. 747, 749, n. 3; *United States v. Brown*, 348 F. 2d 661 (C.A. 2), certiorari denied, 382 U.S. 904; *Lawson v. United States*, 248 F. 2d 654 (C.A.D.C.), certiorari denied, 355 U.S. 963; *United States v. Ladson*, 294 F. 2d 535, 538-539 (C.A. 2), certiorari denied, 369 U.S. 824. As with their contentions in regard to the allegedly prejudicial publicity, petitioners cannot "speculate on a favorable verdict and then claim [error] when the gamble failed" (see Pet. J. App. 9a).

In any event, the circumstances here are very different from those involved in *Massiah v. United States*, 377 U.S. 201, and in *Escobedo v. Illinois*, 378 U.S. 478. The interviews of these petitioners involved no overreaching by government agents nor any efforts to trick unwary defendants or to obtain admissions from inexperienced suspects which the presence of

⁵ Marchetti claims a conflict between *Indiviglio* (which was decided *en banc*) and a panel decision of the same court in *United States ex rel. Stovall v. Denno*, decision unreported (1965). *Stovall* has, however, been set down for rehearing *en banc*.

counsel would have prevented. The questioning was not surreptitious, as in *Massiah* (see 377 U.S. at 206); it took place on the premises where the arrests were made and not in the interrogation room at the jailhouse, as in *Escobedo* (compare also *Lee v. United States*, 322 F. 2d 770, 772 (C.A. 5)). Unlike *Escobedo*, petitioners were warned of their right to remain silent, and they did not request the assistance of counsel (see 378 U.S. at 491). Petitioners were, like the defendant in *Crooker v. California*, 357 U.S. 433, experienced and aware of their rights. Nor did they, when questioned, plead guilty or confess. Gjanci's statement was exculpatory, and Marchetti's constituted an effort to shield Costello. In these circumstances, the questioning of Marchetti and Gjanci cannot be deemed so unfair that it was necessary for the trial judge to exclude their statements notwithstanding the failure to object or for the court of appeals to treat their admission as "plain error" within the meaning of Rule 52(b), F.R. Crim. P.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1966.

APPENDIX

FORM 11-C Rev. Mar. 1966	U. S. Treasury Department—Internal Revenue Service SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING <small>(See instructions on reverse for time and place for filing return)</small>
Return for period from _____ to June 30, 19____ <small>(Month, day, and year)</small>	
1. Name: True name _____ <small>Alias, style, or trade name, if any</small> _____ 2. Address: Residence _____ <small>(Number and street)</small> _____ <small>(City)</small> _____ <small>(County)</small> _____ <small>(State)</small> _____ Business _____ <small>(Number and street)</small> _____ <small>(City)</small> _____ <small>(County)</small> _____ <small>(State)</small> _____	For District Director's Use Only Stamp number _____ Date issued _____ Registration number _____ Tax _____ \$ _____ Penalty _____ \$ _____ Interest _____ \$ _____ Total _____ \$ _____
3. If this is merely an application for registry with which no remittance of tax is required, please explain and give your Special Tax Stamp No. and Registration No. (see instruction 2) _____ _____ _____	
4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers. <small>(If additional space is required by items 4, 5 (a), 5 (b), or 6, attach additional sheet, identifying each entry as to item number.)</small>	
True name _____ _____ _____ _____	Title _____ _____ _____ _____
5. Are you engaged in the business of accepting wagers on your own account? <input type="checkbox"/> Yes <input type="checkbox"/> No <small>If yes, complete (a), (b), and (c) of this item.</small>	
(a) Name and address where each such business is conducted. Name of location _____ Street address _____ City and State _____ _____ _____	
(b) Number of employees and/or agents engaged in receiving wagers on your behalf (c) True name, current address, and special tax stamp number of each such person.	
True name _____ _____ _____ _____	Special stamp No. to present use _____ Street address _____ City and State _____ _____ _____
6. Do you receive wagers for or on behalf of some other person or persons? <input type="checkbox"/> Yes <input type="checkbox"/> No <small>If yes, give true name and address of each such person.</small>	
True name _____ _____ _____ _____	Street address _____ City and State _____ _____ _____
SIGNATURE AND VERIFICATION I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.	
_____ <small>(Date)</small> 19____	_____ <small>(Signature)</small> <small>(State whether individual owner, member of firm, or if corporation officer, give title)</small>



Office-Supreme Court, U.S.

FILED

JAN 13 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~88~~

2

JAMES MARCHETTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF AND APPENDIX FOR PETITIONER

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1966

No. 38

JAMES MARCHETTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the U. S. Court of Appeals for the Second Circuit is reported, *sub nomine*, *United States v. Costello, et al.*, 352 F. 2d 848 (2 Cir. 1965) (R. 16-21).¹ The opinion of the court of appeals in a related case, referred to in the *per curiam* denial of the petition for rehearing, is reported

¹ References are indicated as follows:

References to the numbered pages of the appendix to this brief (a).

References to the numbered pages of the Transcript of Record in *Costello v. United States*, No. 41, this Term (R.).

References to the numbered pages of the Government's brief in *Costello v. United States*, No. 41, this Term (Govt. Br.).

References to the numbered pages of the Government's brief in *Grosso v. United States*, No. 181, this Term (Govt. Br., Grosso v. U. S.).

as *United States v. Grassia*, 354 F. 2d 27 (2 Cir. 1965) (13a).

Jurisdiction

The judgments of the court of appeals were entered on October 29, 1965 (R. 29). A timely petition for rehearing was denied on November 26, 1965 (R. 31). The petition for a writ of certiorari was filed on December 15, 1965, and was granted on January 9, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented

This Court limited its grant of certiorari to the following question:

"Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court especially in view of its recent decision in *Albertson vs. Subversive Activities Control Board*, 382 U. S. 70 (1965); overrule *United States vs. Kahriger*, 345 U. S. 22 (1953) and *Lewis vs. United States*, 348 U. S. 419 (1955)?"

Constitutional and Statutory Provisions Involved

Petitioner maintains that the judgments of the court below, affirming his convictions for violations of the wagering tax laws and the federal conspiracy statute, violate his rights under the Fifth Amendment of the United States Constitution. This constitutional provision, as well as

wagering tax laws involved, 26 U. S. C. §§4401, 4411 and 4412, and the general internal revenue statutes and regulations relative to petitioner's claim are set forth in the appendix to this brief (1a-6a).

Statement

Petitioner faces a one-year prison sentence and a \$10,000 fine for conviction in the United States District Court for the District of Connecticut on two indictments charging willful violations of the wagering tax statutes and the federal conspiracy statute (7a, R. 1). One indictment charged a conspiracy among petitioner and co-defendants Costello and Gjanci willfully to fail to pay the special wagering occupational tax imposed by 26 U. S. C. §4411 (R. 1). The second indictment, in two counts, charged the willful failure to pay the special occupational tax, required by 26 U. S. C. §4411, and the willful failure to register, required by 26 U. S. C. §4412 (7a).

After verdict, petitioner moved to arrest judgment, claiming, *inter alia*, that the statutes providing for the special wagering occupational tax and registration violated his Fifth Amendment privilege against self-incrimination (R. 5-9). The trial court denied the motion and imposed a one-year prison sentence and a \$10,000 fine upon petitioner (9a-11a).

On appeal the court below affirmed, holding that the claim with respect to the self-incrimination clause was controlled by *United States v. Kahriger*, 345 U. S. 22 (1953), and *Lewis v. United States*, 348 U. S. 419 (1955). On petition for rehearing, the court of appeals denied relief, but noted, by reference to *United States v. Grassia*, 354 F. 2d 27 (2

Cir. 1965), that while "the rationale of *Albertson* . . . may lead the Supreme Court to overrule its previous decisions in . . . *Kahriger* . . . and . . . *Lewis*, insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination" (14a).

This Court originally granted certiorari to review the issue involved here in *Costello v. United States*, No. 41, this Term, and upon Costello's death, the petition for a writ of certiorari in this case, which was filed December 15, 1965, was granted, limited to the question as originally framed in the *Costello* case.

Summary of Argument

This brief is, in effect, a reply to the Government's brief in *Costello v. United States*, No. 41, this Term, which the Court has held in abeyance because of the death of Costello. Relying upon the main brief filed in *Costello*, petitioner submits this three-fold response to the Government's position:

1. The Government has failed to justify the *Kahriger-Lewis* doctrine—a judicial aberration in the development of the privilege against self-incrimination—and a doctrine this Court now desires to review. Under cases both before and after *Kahriger* and *Lewis*, the statutory scheme here involved violates the Fifth Amendment privilege.

2. The Government proposal that the Court fashion an exclusionary rule similar to the one announced in *Murphy v. Waterfront Commission*, 378 U. S. 52 (1964), in the event *Kahriger* and *Lewis* are abandoned, ignores the pronounce-

ment in *Murphy* that the remedy only has application when a state has granted immunity. Moreover, the Government's proposed remedy constitutes a dilution of the privilege—a dilution it purports to justify on the premise, rejected by this Court, that the privilege has less force when written, as opposed to oral, inquiry is made.

3. The Government's strained contention that petitioner's convictions should be affirmed is inconsistent with the very *Murphy* type remedy it espouses. In *Murphy*, the recalcitrant witness's contempt conviction was reversed in view of the altered scope of the privilege announced in *Murphy*. Even under the restricted *Murphy* rationale, then, there is no justification for affirming petitioner's convictions.

ARGUMENT

I.

By its limited, but specific grant of certiorari, this Court has called for a reevaluation of *United States v. Kahriger*, 345 U. S. 22 (1953), and *Lewis v. United States*, 348 U. S. 419 (1955), which upheld against Fifth Amendment objection the occupational tax on wagering and the accompanying registration provision. 26 U. S. C. §§4411, 4412. The Government's argument, however, avoids the precise inquiry this case presents, but *restates*, without reevaluation, the *Kahriger* and *Lewis* holdings, now here for review.

In an effort to uphold the wagering tax statutes involved, the Government takes a twofold position: First, it argues that payment of the special occupational tax and the accompanying registration are prospective only and, therefore, non-compulsory (Govt. Br. 14-15), which, to be sure,

is the teaching of *Kahriger*, *supra*, 345 U. S. at 32, and *Lewis*, *supra*, 348 U. S. at 422. Second, it urges that *Albertson v. Subversive Activities Control Board*, 382 U. S. 70 (1966), is distinguishable and does not undermine the *Kahriger-Lewis* doctrine (Govt. Br. 15). Most significantly, however, the Government refrains from (1) measuring the *Kahriger-Lewis* doctrine against the scope of the privilege, as defined both before and after *Kahriger* and *Lewis* and (2) examining the sole cited authority in *Kahriger*—a single citation to Professor Wigmore's treatise—for the proposition that the privilege relates only to past acts. The twofold review which the Government fails to make calls for a reversal of *Kahriger* and *Lewis*. *Albertson*, faultily distinguished by the Government, reinforces that conclusion:

1. The Government completely refrains from measuring the *Kahriger-Lewis* doctrine against the scope of the privilege, as defined prior to and since *Kahriger* and *Lewis*. From the first influential construction of the privilege by Chief Justice John Marshall on circuit, *United States v. Burr*, 25 Fed. Cas. (No. 14692e) (C. C. Va. 1807), to this Court's most recent pronouncements, *Malloy v. Hogan*, 378 U. S. 1, 12 (1964); *Albertson v. Subversive Activities Control Board*, *supra*, 382 U. S. at 78, the doctrine has been firmly fixed that the privilege "not only extends to answers that would in themselves support a conviction . . . , but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute." *Hoffman v. United States*, 341 U. S. 479, 486 (1951). *Kahriger* and *Lewis*, grounded on the notion that representations of intent to engage in criminal activity do not incriminate, flout that link-in-the-chain principle so otherwise well established in constitutional doctrine.

Even assuming, *arguendo*, that the wagering tax statutory scheme relates to future intent only, the disclosed intent most certainly qualifies as at least a link-in-the-chain of evidence that could lead to a prosecution for both federal and state crimes. In fact, compliance with the wagering tax statutes here involved has been utilized to incriminate defendants in both federal and state prosecutions:

In *Acklen v. State of Tennessee*, 196 Tenn. 314, 267 S. W. 2d 101 (1954), the defendant was convicted of conspiracy to violate a state gambling statute on the ground that he had complied with the statutes here involved.

In *Irvine v. California*, 347 U. S. 128, 130 (1954), the defendant was convicted of violating a California gambling statute, partly upon evidence that he had complied with the statutes here involved.

In *Deitch, et al. v. City of Chattanooga*, 195 Tenn. 245, 258 S. W. 2d 776, 777 (1953), the defendants were convicted of gaming and possession of gaming devices, on the basis that they had applied for and possessed federal wagering stamps and had paid the 10 per cent excise tax.

In *State v. Curry*, 91 Ohio App. 1, 109 N. E. 2d 298 (1952), the defendant was convicted of engaging in gambling for a living and being a common gambler after receipt in evidence of his special tax return and application for registry. Against the defendant's claim that the return was "merely an expression of intent to perform an illegal act in the future," the Ohio court noted:

"[it] is admissible in evidence as bearing upon the question of the intent of the accused, upon the theory that a subsequently intended course of conduct showing a then existing state of mind is admissible in evidence

from which the inference may be drawn of a previous intention to pursue a similar course of conduct, where coupled with proof of prior conduct (possession on numerous occasions of illegal lottery slips) tending to prove the offense charged . . . [and to show] . . . 'motive, intent.'" 109 N. E. 2d at 301.

In *Commonwealth v. Fiorini*, 202 Pa. Super. 88, 195 A. 2d 119 (1963), the defendant was convicted of being concerned in the operation of a lottery after his federal wagering tax stamp was introduced in evidence against him.

In *State v. Mills*, 229 La. 758, 86 So. 2d 895 (1965), *cert. den.* 352 U. S. 834 (1956), the defendants were convicted of gambling, after the applications for the wagering tax stamp were introduced against them.

In *Grigsby v. Mitchum*, 191 Kan. 293, 380 P. 2d 363 (1963), *cert. den.* 375 U. S. 966 (1963), a city ordinance prohibiting the issuance of a pinball license to one who had paid the current \$250.00 federal occupational tax and requiring the revocation of such a license if issued, was sustained against constitutional attack.

In *McClary v. State of Tennessee*, 211 Tenn. 46, 362 S. W. 2d 450 (1962), the defendant's conviction for professional gambling was sustained, in part on the ground that his purchase and possession of a federal wagering tax stamp raised "a presumption of gambling during the period covered by such a stamp. . . ." 362 S. W. 2d at 454.

In *State of Louisiana v. Reinhardt*, 229 La. 673, 86 So. 2d 530 (1956), the defendant was convicted of conducting a lottery, after the admission of evidence that the defendant had purchased a federal wagering stamp.

In *State of Louisiana v. Forsyth*, 229 La. 690, 86 So. 2d 536 (1956), the defendant's convictions for gambling and operating a lottery were based in part upon his federal wagering tax records.

And in *United States v. Zizzo*, 338 F. 2d 577, 580 (7 Cir. 1964),² the defendant was convicted of traveling in interstate commerce with intent to carry on gambling in violation of 18 U. S. C. §1952, partly upon evidence of compliance with the statutes here involved.

2. Nor does the Government in any way justify the sole authority cited as the foundation in *Kahriger*, *supra*, 345 U. S. at 32, and relied upon in *Lewis*, *supra*, 348 U. S. at 422, that the privilege has relation only to past acts, not to future acts that may or may not be committed. The only authority is the citation to Professor Wigmore's work. 8 Wigmore, EVIDENCE §2259 (c) (3d. ed. 1940). Of this Wigmore principle, Professor Morgan said prior to *Kahriger* that only a strained reading can

"... save the generalization from absurdity ... [and that] no court has formulated or adopted such a generalization." Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 37 (1949).

3. The Government's attempt to avoid the impact of *Albertson* is misplaced:

² *Zizzo* belies the Government's claim that the wagering tax statutes "do not conflict with the Fifth Amendment in places where gambling is lawful" (Govt. Br. 12), for it establishes that the admissions required can be used in federal prosecutions. Other federal crimes, besides the anti-racketeering statute involved in *Zizzo*, are 18 U. S. C. §1084 (transmission of wagering information), §§1301-1305 (lotteries) and §1953 (interstate transportation of wagering paraphernalia).

First, argues the Government, the voiding of the registration requirement in *Albertson* was somehow brought about or motivated by First Amendment considerations (Govt. Br. 8). Such a reading of *Albertson*, however, ignores the Court's specific refusal to extend its grant of certiorari to the First Amendment issue framed. 382 U. S. at 74, n. 6.

Second, contends the Government, the abridgement of the privilege against self-incrimination is somehow justified when a "countervailing constitutional interest is involved" such as the collection of the wagering tax (Govt. Br. 16). Leaving to one side the miniscule relationship of the wagering tax to the national fisc, this Court has made it clear that the Fifth Amendment affords "a witness the right to resist inquiry in all circumstances . . ." even if the Government is seeking his testimony in the name of "self-preservation, 'the ultimate value of any society.'" *Barenblatt v. United States*, 360 U. S. 109, 126, 128 (1959). Nothing in *Albertson* remotely suggests the contrary.

Even assuming, *arguendo*, that the judicial balancing technique the Government urges were justified—and petitioner maintains that no such policy is warranted—this is hardly the tax which would require the limiting of the privilege. The "substantial governmental interest . . . [in] the collection" of the tax (Govt. Br., *Grosso v. U. S.* 26) is not applicable here. In testifying before a Senate committee in 1961, former IRS Commissioner Caplin first noted eight reasons for the Service's opposition to the wagering taxes. Among the reasons were: (1) they involve the Service in what are "essentially police procedures distinct from revenue collections," (2) they are virtually "unenforceable as a practical matter," (3) their enforcement

would require additional manpower "greatly out of proportion to the revenue to be derived," and (4) they might cause gambling operators to "evade income taxes as well as the wagering taxes." Then the following colloquy occurred:

"The Chairman. In other words, in this effort under existing laws to collect the tax, it costs more to collect it than that which you are able to collect?"

"Mr. Caplin. Yes, sir." *Hearings Before the Permanent Committee on Investigations of the Committee on Government Operations* (U. S. Senate, 87th Cong., 1st Sess., Part I, August 23, 1961, pages 94, 95-96).

Third, says the Government, the "new" wagering tax form, Form 11-C, injected in this case for the first time at this stage (Govt. Br. App.), asks questions which are "at most equivocal" and more related to future activity than the form in *Albertson* (Govt. Br. 14, 15).³ But the "new" Form 11-C asks, in question 5(b), for example, for the number and name of each person "*engaged* in receiving wagers on your behalf." This is hardly an inquiry directed to the future; it certainly calls for answers as incriminating as the questions propounded in the *Albertson* form. Here, as in *Albertson*, "the risks of incrimination . . . are obvious." 382 U. S. at 77.

³ This "new" Form 11-C was not available when petitioner filed his motion in the trial court (R. 6) and apparently was still unavailable when the Government, in January 1966, filed its brief in opposition to the petition for certiorari (Govt. Br. in Opposition, Appendix) in this case. At any rate, the old form was in use at the time relevant to this prosecution. Moreover, both forms run afoul of this Court's Fifth Amendment command which bars all inquiries, except those which cannot possibly have such tendency to incriminate. *Malloy v. Hogan, supra*, 378 U. S. at 12.

In the context of the wagering tax statutes, the privilege against self-incrimination—which this Court has recognized as “‘one of the great landmarks in man’s struggle to make himself civilized,’” *Ullmann v. United States*, 350 U. S. 422, 426 (1956)—stands stained by the rationale of *Kahriger* and *Lewis*. In accordance with this Court’s mandate that the privilege “must be accorded liberal construction in favor of the right it was intended to secure,” *Hoffman v. United States*, *supra*, 341 U. S. at 486, petitioner urges that *Kahriger* and *Lewis* be overruled.

II.

In the major portion of its brief, the Government argues that, if *Kahriger* and *Lewis* be reversed, the proper remedy is for this Court to uphold the wagering tax, but bar further use of information acquired in the enforcement of wagering tax statutes (Govt. Br. 19-27). Ignoring a whole host of decisions holding that the right to silence is the remedy for proper invocation of the privilege, the Government urges the creation of an imprecise exclusionary rule recognized in *Murphy v. Waterfront Commission*, *supra*, 378 U. S. at 79.

Murphy, to be sure, did provide for a rule of exclusion, but the Court invoked this remedy only because it had to “decide what effect . . . [abrogation of the dual sovereignty doctrine] has on existing state immunity legislation.” 378 U. S. at 78 (emphasis added). Since it was well recognized that states could not grant immunity from federal prosecution, *United States v. Murdock*, 284 U. S. 141, 149 (1931); *Jack v. Kansas*, 199 U. S. 372, 380 (1905), a ruling in *Murphy* that a witness could remain silent because of fear of federal prosecution after a grant of immunity by

a state would have, in effect, repealed all state immunity statutes. Sobel, *The Privilege Against Self-Incrimination 'Federalized'*, 31 BROOKLYN L. REV. 1, 46 (1964). But to have held, on the other hand, that a purported grant of immunity by states must have extended, in view of the elimination of the dual sovereignty rule, to federal prosecution would run afoul of the supremacy clause.⁴ In order to accommodate both the constitutional privilege and the constitutional provision regarding federal supremacy, and to salvage the state immunity statutes, the Court fashioned the *Murphy* remedy of immunity from use. But, there being no state immunity legislation to salvage here, there is no justification for applying the *Murphy* remedy.

That the *Murphy* remedy is inapplicable except when a state immunity statute is involved is clear from both *Malloy v. Hogan*, *supra*, and *Albertson v. Subversive Activities Control Board*, *supra*. In *Malloy*, decided the same day as *Murphy*, and in *Albertson*, where no state immunity statutes were involved, this Court upheld the Fifth Amendment right to remain silent. If the Government's contention here be sound, *Malloy* and *Albertson* were wrongly decided: (1) *Malloy*, under the Government's notion, should have provided for compelled testimony on remand and immunity from use of the testimony disclosed, and (2) *Albertson*, under the Government's view, should have provided for compelled registration with the proviso that the informa-

⁴ "If a state were allowed to grant immunity from federal prosecution, federal authorities would be vulnerable to severe restrictions on their activities. Since the federal government could have no check on state grants of immunity, corruption and 'immunity baths' could easily result." Note, *Counselman, Malloy, Murphy, and the State's Power to Grant Immunity*, 20 RUTGERS L. REV. 336, 345-346 (1966).

tion disclosed could not be used against the registrant. But, as noted, there is no gainsaying the fact that this Court in *Murphy* and *Albertson* did not do this.

The Government attempts to distinguish *Albertson* because the registration in *Albertson* did not secure information necessary for law enforcement (Govt. Br. 22; Govt. Br., *Grosso v. U. S.* 26). But certainly that claimed distinction does not explain *Malloy* where Connecticut sought information concerning gambling. 378 U. S. at 3.

The Government does not, and indeed, cannot cite any authority for the proposition that in the absence of full immunity the proponent of a proper use of the Fifth Amendment privilege can be forced to respond to inquiry propounded by any agency of the United States or, in the alternative, face punishment.⁵ The Government rule now proposed would bring about such a result and dilute the doctrine established in *Counselman v. Hitchcock*, 142 U. S. 547, 585 (1892), that no ruling "which leaves the party . . . subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege."

The Government is quick to assert that it does not contemplate immunity from prosecution as a part of its proposed, judicially created remedy (Govt. Br., *Grosso v. U. S.* 20). It rightly recognizes that immunity is a matter of

⁵ As the Government virtually concedes, neither the coerced confessions nor *Miranda* situations are pertinent, since once the silence has been broken and evidence obtained, the Court can, "as a practical matter, focus only upon the point of attempted use" (Govt. Br. 20). The traditional right to remain silent can not be observed after this type of Fifth Amendment violation.

legislative concern (Govt. Br., *Grosso v. U. S.* 21).⁶ It follows, therefore, that what the Government really urges is a *sub silentio* rejection of the *Counselman* doctrine that the Fifth Amendment assures the right to silence unless there is full-scope immunity. Yet this Court has consistently applied the *Counselman* doctrine. *Brown v. Walker*, 161 U. S. 591, 610 (1896); *Ullmann v. United States*, *supra*, 350 U. S. at 430-1; *Reina v. United States*, 364 U. S. 507, 514 (1960).

In *Brown*, *Ullmann*, and *Reina* the Court authorized abandonment of the witnesses' Fifth Amendment right to silence only after recognizing that the immunity statutes involved were coextensive with the Fifth Amendment.

Moreover, in *Albertson*, decided after *Murphy*, the Court reiterated the need for a grant of *absolute immunity* against future prosecution as a condition precedent to compelling a witness to abandon his right to remain silent if he fears incrimination. 382 U. S. at 80.

The Government, in promoting the exclusionary rule, establishes a "use point"—"compulsion point" dichotomy (Govt. Br., *Grosso v. U. S.* 24) and suggests that only if a witness is testifying orally is the protection of the priv-

⁶ This recognition also destroys the Government's heavy reliance on *United States v. Blue*, 384 U. S. 251 (1966). It is difficult to see how the Government claims that the Court's failure to sustain the dismissal of the *Blue* indictment justifies an exclusionary rule in this case (Govt. Br. 21). *Blue* can not be said to stand for the rejection of the need for a legislative, full grant of immunity prior to the compulsion of a response to official inquiry. Contrary to the Government's assertion, it shows no selection for the "use point" over the "compulsion point" (Govt. Br. 21). Rather, the *Blue* situation is akin to the coerced confession and *Miranda* situations, where violation of the traditional Fifth Amendment silence has already occurred.

ilege "appropriately invoked" at the compulsion point (Govt. Br., *Grosso v. U. S.* 13-14). Here again, this view has been rejected by *Albertson*:

"These cases involved questions to witnesses on the witness stand but if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes." 382 U. S. at 78.

The *Murphy* exclusionary rule, then, fashioned to protect immunity statutes not here involved, cannot be applied here without dilution of the privilege. The Government argument to the contrary ignores, *inter alia*, the *Malloy* case, decided with *Murphy*, and is based upon a false distinction between oral and written inquiries.⁷

III.

In urging an exclusionary rule, the Government places prime reliance on *Murphy*. Yet it denies to petitioner the benefits of the disposition there (Govt. Br. 26). If the Government's exclusionary rule were accepted, then by hypothesis, the privilege has been violated and a new remedy is to be fashioned: the exclusion of the use of information acquired by the compliance with the wagering tax statutes.

⁷ And the Government appears to shy away from the obvious implication of its proposed exclusionary rule. After being ordered to express its views on a case where a defendant was convicted, at least partially upon proof of registration under the federal tax laws, the Government refuses to "suggest a disposition" (Memorandum for U. S., *Rainwater v. Florida*, No. 555, this Term, *certiorari* pending, p. 3), apparently having second thoughts about the effect of its proposal on federal-state relations.

But neither petitioner, nor the witness in *Murphy*, had reason to anticipate such a result. The key point in time is that of the alleged offense. At that time, petitioner had every reason to fear that he would incriminate himself by complying with the wagering tax laws. He had no reason to believe that compliance, followed by a challenge to the use or admissibility against him of the registration information would provide a more fruitful line of attack. *Irvine v. California, supra*. It is difficult to see how the Government can reasonably argue that one faced with the dilemma of self-incrimination should go free if he chose successfully to challenge *Irvine*, but that his conviction should stand even though he successfully challenged *Kahriger* and *Lewis*.

Even if the Court is now to adopt the *Murphy* rationale, it must, in fairness, reverse petitioner's convictions. Certainly, the label of civil contempt, which the Government relies upon in a footnote (Govt. Br. 26), should be of no import.

Conclusion

Analysis of the wagering tax scheme here under review indicates that it can have no other tendency but to incriminate those who comply with it. *Kahriger* and *Lewis*—strikingly to the side of the mainstream of Fifth Amendment doctrine—should be overturned in recognition of this fact. The *Murphy* type exclusionary rule the Government requests is not an appropriate substitute for the right to remain silent. But even if it were it could not justifiably be applied to sustain petitioner's convictions.

For these reasons, then, the judgments of the court below should be—and petitioner requests that they be—reversed with directions to enter judgments of acquittal.

Respectfully submitted,

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January 13, 1967.

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APPENDIX

Constitutional Provisions, Statutes, and Regulations Involved

Amend. V, U. S. Const.: *Capital Crimes; Double Jeopardy; Self-incrimination; Due Process; Just Compensation for Property.*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

68A Stat. 525 (1954), 26 U. S. C. §4401 (1958): *Imposition of tax*

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a

separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

68A Stat. 527 (1954), 26 U. S. C. §4411 (1958): *Imposition of tax*

There shall be imposed a special tax of \$50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

68A Stat. 527 (1954), 26 U. S. C. §4412 (1958): *Registration*

(a) Requirement—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

- (1) his name and place of residence;
- (2) if he is liable for tax under subchapter A, each place of business where the activity which makes

him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

68A Stat. 528 (1954), 26 U. S. C. §4422 (1958): *Applicability of federal and state laws*

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

68A Stat. 528 (1954), 26 U. S. C. §4423 (1958): *Inspection of books*

Notwithstanding section 7605(b), the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter.

68A Stat. 593 (1954), 26 U. S. C. §4901 (1958): *Payment of tax*

(a) Condition precedent to carrying on certain business.—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461(2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor:

(b) Computation.—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

(c) How paid.—

(1) Stamp.—All special taxes imposed by law shall be paid by stamps denoting the tax.

68A Stat. 732 (1954), 26 U. S. C. §6011 (1958): *General requirement of return, statement, or list*

(a) General rule.—When required by regulations prescribed by the Secretary or his delegate any person

made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

68A Stat. 851 (1954), 26 U. S. C. §7203 (1958): *Willful failure to file return, supply information or pay tax*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 C. F. R. §44.4412-1 (Relevant Portions)

(b) . . .

(2) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter,

a return shall be filed on Form 11-C, marked "Supplemental", each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10 days after the date such additional employee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see § 44.4905-2.

(3) Each agent or employee who receives wagers for or on behalf of a person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and residence address of each person (i.e., individual, partnership, corporation, etc.) on whose behalf wagers are to be received. Thereafter, the agent or employee shall file a return on Form 11-C, marked "Supplemental", each time he is engaged or employed to receive wagers for a person or persons other than the person or persons previously reported on Form 11-C. Such supplemental return shall be filed not later than 10 days after the date he is engaged to receive wagers and shall show the name, business address, or, if none, the residence address of the person or persons by whom he is engaged to receive wagers.

...

5

Indictment [No. 11,270]*The Grand Judge Charges:***COUNT ONE**

JAMES "TOTTO" MARCHETTI, of Bridgeport in the District of Connecticut, on divers dates from on or about August 3, 1964, through on or about September 1, 1964, at Bridgeport, Connecticut in said District did engage in the business of accepting wagers as defined in 26 United States Code 4421, and did engage in receiving wagers for or on behalf of a person liable for the tax on wagers imposed by 26 United States Code 4401, having wilfully failed prior to engaging in said business and receiving said wagers to pay the special occupational tax as required by 26 United States Code 4411, due and owing the United States of America for the year ending June 30, 1965, in violation of Title 26, United States Code, Section 7203.

COUNT TWO

JAMES "TOTTO" MARCHETTI, of Bridgeport in the District of Connecticut, on divers dates from on or about August 3, 1964, through on or about September 1, 1964, at Bridgeport, Connecticut in said District did engage in the business of accepting wagers as defined in 26 United States Code 4421, and did engage in receiving wagers for or on behalf of a person liable for the tax on wagers imposed by 26 United States Code 4401, having wilfully failed prior to engaging in said business and receiving said wagers to

register as required by 26 United States Code 4412, in violation of Title 26, United States Code, Section 7203.

A TRUE BILL

Foreman

/s/ F. OWEN EAGAN

F. Owen Eagan

United States Attorney

/s/ HOWARD T. OWENS, JR.

Howard T. Owens, Jr.

Assistant United States Attorney

Judgment and Commitment [No. 11,267]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

No. 11,267 Criminal

UNITED STATES OF AMERICA

v.

JAMES "TOTTO" MARCHETTI

On this 11th day of January, 1965, came the attorney for the government and the defendant appeared in person and¹ by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of² not guilty and a verdict of guilty of the offense of violation of Title 18, Section 371 of the United States Code, (conspiracy to violate Title 26, Section 7203 of the United States Code), as charged³ in count number one and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴ one (1)

year. The defendant is required to pay a fine of TEN THOUSAND (\$10,000) DOLLARS. This fine is to be a committed fine.

Execution of the sentence of imprisonment is stayed twenty-four hours.

~~It Is Adjudged that:~~⁵

It Is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

WM. H. TIMBERS,
United States District Judge.

The Court recommends commitment to:⁶

Clerk.

¹ Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." ² Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. ³ Insert "in count(s) number" if required. ⁴ Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. ⁵ Enter any order with respect to suspension and probation. ⁶ For use of Court wishing to recommend a particular institution.

Judgment and Commitment [No. 11,270]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

No. 11,270 Criminal

UNITED STATES OF AMERICA

v.

JAMES "TOTTO" MARCHETTI

On this 11th day of January, 1965, came the attorney for the government and the defendant appeared in person and¹ by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of² not guilty and a verdict of guilty of the offense of violation of Title 26, Section 7203 of the United States Code, (person engaged in the business of accepting and receiving wagers failed to pay special occupational tax as required; and failed to register as required), as charged³ in count numbers one and two and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴ one (1)

year on count number one. The defendant is required to pay a fine of \$10,000 on count number one. This fine is to be a committed fine. The sentence of imprisonment and the fine in this case are to run concurrently with the sentence imposed in Criminal Case No. 11,267.

Imposition of sentence is suspended on count number two and the defendant is to be placed on probation for a period of two years from the date of release from prison.

~~It Is Adjudged that:~~⁵

Execution of the sentence of imprisonment is stayed twenty-four hours.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

United States District Judge.

The Court recommends commitment to:⁶

Clerk.

¹ Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

² Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. ³ Insert "in count(s) number" if required. ⁴ Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with, reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. ⁵ Enter any order with respect to suspension and probation. ⁶ For use of Court wishing to recommend a particular institution.

Partial Opinion in *U. S. v. Grassia*

The following is the relevant portion of the opinion of the Court of Appeals for the Second Circuit in *United States v. Grassia*, 354 F. 2d 27 (2 Cir. 1965).

FRIENDLY, *Circuit Judge*:

This is another appeal stemming from the raids relating to enforcement of the federal wagering tax at Bridgeport, Connecticut, on October 8, 1964. See *United States v. Costello*, 352 F. 2d 848 (2 Cir. 1965), *United States v. Piccioli*, 352 F. 2d 856 (2 Cir. 1965), and *United States v. Markis*, 352 F. 2d 860 (2 Cir. 1965). Alfred Grassia, represented by counsel and duly questioned by Judge Clarie at a term of the District Court for Connecticut at Hartford, to which, at his request, his case had been transferred for trial on his not guilty plea, pleaded *nolo contendere* to one count of a two-count indictment charging, under 26 U. S. C. §7203, willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411. The other count was then dismissed at the Government's request. His points on appeal from the resulting conviction fall into two categories. The first repeats the same constitutional attacks on the federal wagering tax statutes that were advanced in the earlier cases. His other point is that the conscious generation of publicity by the Government and statements by Chief Judge Timbers in the course of other proceedings in January and February, 1965, prior to Grassia's change of plea,¹ see *United States v. Costello*, *supra*, 352 F. 2d at —, *United States v. Piccioli*, *supra*, 352 F. 2d

¹ The judge's statements were the basis of one of several motions by Grassia to dismiss the indictment or for a continuance.

—, so prejudiced his opportunity for a fair trial that the indictment should have been dismissed.

The first group of contentions, challenging the constitutionality of the federal wagering tax statutes, survive the plea of *nolo contendere*, as the Government concedes. But, so far as this Court is concerned, they have been determined adversely to Grassia by *United States v. Costello*, *supra*, 352 F. 2d 848. Recognizing that the rationale of *Albertson v. Subversive Activities Control Board*, 382 U. S. 70 (1965), announced subsequent to our *Costello* opinion, may lead the Supreme Court to overrule its previous decisions in *United States v. Kahriger*, 345 U. S. 22 (1953), and *Lewis v. United States*, 348 U. S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination.

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FILED

AUG 22 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 2

JAMES MARCHETTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**SUPPLEMENTAL BRIEF AND APPENDIX
FOR PETITIONER**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 2

JAMES MARCHETTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

Opinions Below

The opinion of the U. S. Court of Appeals for the Second Circuit is reported, *sub nomine*, *United States v. Costello; et al.*, 352 F. 2d 848 (2 Cir. 1965) (R. 16-21).¹ The opinion

¹ References are indicated as follows:

References to the numbered pages of the appendix to this brief
(a).

References to the numbered pages of the Transcript of Record
in *Costello v. United States*, No. 3, this Term (R.).

References to the numbered pages of the Government's brief in
Costello v. United States, No. 3, this Term (Govt. Br.).

References to the numbered pages of the Government's brief in
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U. S.).

of the court of appeals in a related case, referred to in the *per curiam* denial of the petition for rehearing, is reported as *United States v. Grassia*, 354 F. 2d 27 (2 Cir. 1965).

Jurisdiction

The judgments of the court of appeals were entered on October 29, 1965 (R. 29). A timely petition for rehearing was denied on November 26, 1965 (R. 31). The petition for a writ of certiorari was filed on December 15, 1965, and was granted on January 9, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

This Court limited its grant of certiorari to the following question:

- (1) Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court especially in view of its recent decision in *Albertson v. Subversive Activities Control Board*, 382 U. S. 70 (1965), overrule *United States v. Kahriger*, 345 U. S. 22 (1953), and *Lewis v. United States*, 348 U. S. 419 (1955)?

In addition, in its order of June 12, 1967, the Court requested the parties to discuss the following questions:

- (2) What relevance, if any, has the required records doctrine, *Shapiro v. United States*, 335 U. S. 1 (1948), to the validity under the Fifth Amendment of the registration and special occupational tax requirements of 26 U. S. C. §§4411, 4412?

- (3) Can an obligation to pay the special occupational tax required by 26 U. S. C. §4411 be satisfied without filing the registration statement provided for by 26 U. S. C. §4412?

Constitutional and Statutory Provisions Involved

Petitioner maintains that the judgments of the court below, affirming his convictions for violations of the wagering tax laws and the federal conspiracy statute, violate his rights under the Fifth Amendment of the United States Constitution. This constitutional provision, as well as the specific occupational and registration wagering tax laws involved, 26 U. S. C. §§4411, 4412, and the general wagering tax laws and internal revenue statutes relative to petitioner's claim are set forth in the appendix to this brief (1a-11a).

Statement

Petitioner faces a one-year prison sentence and a \$10,000 fine for conviction in the United States District Court for the District of Connecticut on two indictments charging willful violations of the wagering tax statutes and the federal conspiracy statute (R. 1). One indictment charged a conspiracy among petitioner and co-defendants Costello and Gjanci willfully to fail to pay the special occupational tax imposed by 26 U. S. C. §4411 (R. 1). The second indictment, in two counts, charged the willful failure to pay the special occupational tax, required by 26 U. S. C. §4411, and the willful failure to register, required by 26 U. S. C. §4412.

After verdict, petitioner moved to arrest judgment, claiming, *inter alia*, that the statutes providing for the special wagering occupational tax and registration violated his Fifth Amendment privilege against self-incrimination (R. 5-9). The trial court denied the motion and imposed a one-year prison sentence and a \$10,000 fine upon petitioner.

On appeal the court below affirmed, holding that the claim with respect to the self-incrimination clause was controlled by *United States v. Kahriger*, 345 U. S. 22 (1953), and *Lewis v. United States*, 348 U. S. 419 (1955). On petition for rehearing, the court of appeals denied relief, but noted, by reference to *United States v. Grassia*, 354 F. 2d 27, 29 (2 Cir. 1965), that while "the rationale of *Albertson* . . . may lead the Supreme Court to overrule its previous decisions in . . . *Kahriger* . . . and . . . *Lewis*, insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination."

This Court originally granted certiorari to review the issue involved here in *Costello v. United States*, 383 U. S. 942 (1966), and upon Costello's death, the petition for a writ of certiorari in this case, which was filed December 15, 1965, was granted.

After oral argument last Term, the Court restored the case to the docket for reargument and requested the parties to discuss, in addition to the question in the original order granting certiorari, the two questions above regarding the required records doctrine and the ability of a taxpayer to pay the occupational tax without registering.

Summary of Argument

This brief deals primarily with the two questions propounded by the Court after the oral argument last Term. It supplements the brief for petitioner filed last Term and the brief filed for petitioner in *Costello v. United States*, *supra*, which the Court has held in abeyance because of the death of Costello.

The statutory framework of the wagering tax laws and the nature of gambling activities in this country are reviewed in an introduction to the argument. This review demonstrates that compliance by petitioner with the wagering tax laws here involved would compel disclosure of information which would necessarily incriminate him under unrelated criminal statutes of both state and federal governments.

In summary, petitioner contends here (1) that the required records doctrine announced in *Shapiro v. United States*, *supra*, has no relevance to the validity of the special occupational tax and registration requirements of 26 U. S. C. §§4411, 4412 in the posture of this case; (2) that the obligation to pay the special occupational tax required by 26 U. S. C. §4411 cannot be satisfied without filing the registration statement provided for by 26 U. S. C. §4412; (3) that the special occupational tax and registration violate petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment, requiring the overruling of the *Kahriger* and *Lewis* cases and (4) that the use-restriction rule urged by the Government in the event the special occupational tax and registration are held to violate the Fifth Amendment privilege is not justified in this case.

ARGUMENT

Introduction

The Nature Of Gambling Activity In The United States And The Wagering Tax Laws.

In order to place petitioner's Fifth Amendment claim in perspective, it is appropriate—particularly in view of the Court's additional inquiries since the original argument—to review the legality of gambling activity in the United States against the framework of the wagering tax laws. Such a review indicates that the wagering tax laws operate upon “a highly selective group inherently suspect of criminal activities . . .” and against “an area permeated with criminal statutes . . .” *Albertson v. Subversive Activities Control Board, supra*, 382 U. S. at 79.

In general, with the exception of parimutuel betting at race tracks, Nevada is the only state which has legalized gambling. Moreover, whenever different forms of gambling have been licensed, usually the law has been repealed within a short period of time. Peterson, GAMBLING . . . SHOULD IT BE LEGALIZED? 94-95 (1951). With the exception of Tennessee, which classifies it as a felony, gambling is a misdemeanor in all states but Nevada. Note, *The Fifth Amendment and the Federal Gambling Tax*, 5 DUKE L. J. 86, 87 n. 9 (1956).

In Connecticut, where petitioner resides, gambling is proscribed by §§53-271 to 53-279, §§53-282 to 53-284, §§53-290 to 53-298 and §54-197, although bingo is authorized under certain conditions, if sponsored by a charitable or-

ganization, §7-169. (Conn. Gen. Stat., 1958 Rev., as amended).

In addition to the almost universal proscription of gambling by the states, Congress has enacted legislation to:

- prohibit interstate transportation of wagering paraphernalia, 18 U. S. C. §1953;

- prohibit transmission of wagering information, 18 U. S. C. §1084;

- prohibit interstate and foreign travel or transportation in aid of racketeering enterprises which includes any business enterprise involving gambling, 18 U. S. C. §1952;

- prohibit transportation of gambling devices, 15 U. S. C. §§1171-1172;

- require registration of manufacturers and dealers of gambling devices, 15 U. S. C. §§1173-1178;

- prohibit gambling on ships or airplanes owned by American citizens in areas of federal jurisdiction, 18 U. S. C. §§1081-1083;

- prohibit importing, transporting or mailing lottery tickets and related matter, 18 U. S. C. §§1301-1303, 19 U. S. C. §1305;

- prohibit broadcasting lottery information, 18 U. S. C. §1304; and

- prohibit lottery material in packaged tobacco, cigars or cigarettes, 26 U. S. C. §5723(c).

It is against this background that the wagering tax laws operate. In 1951, in the wake of a Senate committee report stating that "organized criminal gangs operating in interstate commerce are firmly entrenched in our large cities in the operation of many different gambling enter-

prises such as bookmaking, policy, slot machines,"² Congress enacted the wagering tax laws here involved.

Two related taxes on wagering have been imposed. The first, not directly involved in this case, is the 10 per cent excise tax on gross wagers accepted. 26 U. S. C. §4401.³ The 10 per cent excise tax is equal to the amount generally recognized to be the profit realized on illegal gambling in this country.⁴ The second tax, the one directly involved

² Third Interim Report, Special Committee to Investigate Organized Crime in Interstate Commerce, S. REP. 307, 82d Cong., 1st Sess. 1-2 (1951).

³ Certiorari was granted to review the constitutionality of this excise tax in *Grosso v. United States*, 385 U. S. 810 (1966), which has been assigned for argument with the instant case.

⁴ The testimony before the Senate Committee reviewing the wagering tax laws was as follows:

"Mr. Searne. I made a survey that lasted 5 years and I interrogated 16,000 people that earn their living from gambling sources . . .

"Mr. Adlerman. Therefore, the percentage is not the same for all bookmakers, but on the average would you say that bookmakers make about 10 percent?

"Mr. Searne. Ten percent on the average, right.

"Mr. Adlerman. Under the Federal Stamp tax, they have to pay 10 percent of the gross value or the handle, is that correct?

"Mr. Searne. Correct.

"Mr. Adlerman. Can you explain to me how they can pay 10 percent of the gross handle and still make anything out of the bet?

"Mr. Searne. They cannot do it . . .

"If you are paying 10 percent on the gross handle on winners and losers, it is absolutely impossible. They cannot pay it.

"The Chairman. Who gets cheated in the transaction?

"Mr. Searne. The Government.

"Mr. Adlerman. In other words, if I understand you correctly, the bookmakers cannot pay the Federal tax of 10 percent and operate legitimately?

here, is a special occupational tax of \$50 per year imposed by 26 U. S. C. §4411 upon persons liable for the 10 per cent excise tax and payable prior to engaging in gambling activity. 26 U. S. C. §4901.

The wagering tax laws do not reach all gambling. By special exemption wagering at a parimutuel enterprise licensed by a state is excluded. 26 U. S. C. §4402. By the definition of wagering, the taxes do not apply if the participants are present when the bets are placed, the winners are selected and the prizes distributed, or if the activity is conducted by an organization exempt from tax under 26 U. S. C. §§501, 502. 26 U. S. C. §4421. As the House Report at the time of the enactment of the laws stated:

"Among those games which are within the scope of the exclusion would be card games such as draw poker, stud poker, and blackjack, roulette games, dice games such as craps, bingo games, and the gambling wheels frequently encountered at county fairs and charity bazaars."⁵

Because of these limitations, the wagering taxes operate primarily upon illegal wagering. All gambling activity carried on in the Nevada casinos is exempt; bingo-like games

"Mr. Scarne. They cannot operate at all. If they paid, they could not operate.

"Mr. Adlerman. In other words, they would have to cheat themselves and work for nothing or not pay the Government 10 percent. The result is they cheat the Government." *Hearings Before the Permanent Subcommittee on Investigation of the Committee on Govt. Operations U. S. Sen., Part I, 87th Cong., 1st Sess. 87-88 (1961).*

⁵ H. R. REP. No. 586, 82d Cong., 1st Sess. 57 (1951).

are exempt; church-operated activities are exempt; and wagering at state-licensed race tracks is exempt.⁶

Several record keeping and registration requirements are incorporated in the wagering tax laws. Everyone liable for the \$50 special occupational tax is, pursuant to 26 U. S. C. §§4412, 6001, required to register and make a return with the appropriate district director of the Internal Revenue Service, giving his name and address, place of gambling activity and names of his agents or his principals, and pursuant to 26 U. S. C. §6011(a), to complete a detailed Form 11-C which is both a tax return and application for registry. Among the questions specifically asked in Form 11-C in effect when petitioner was required to register were:

"5. Are you engaged in the business of accepting wagers on your own account?

"6. Do you receive wagers for or on behalf of some other person or persons?" (11a).

In addition, each person liable for the 10 per cent excise tax is required to keep daily records showing details of his operations. 26 U. S. C. §4403. These records may be

⁶ To be sure, Nevada bookmaking and policy operations, legal under state law, are not exempt from the wagering tax laws. But the Treasury Regulations and the Nevada gaming regulations combine to ease the burden on the Nevada bookmaker and policy operator. Treasury Regulations provide that the amount of the tax can be collected from the bettor as a separate charge only if "it is established by actual records of the taxpayer that such amount of tax was collected from the bettor as a separate charge." 26 C. F. R. §44.4401-1 (iv). Nevada regulations provide, "The entire amount of federal tax shall be collected from the player and adequate records thereof maintained." Regs., Nevada Gaming Comm. & Control Board §5.020 (1966).

examined and inspected as frequently as necessary. 26 U. S. C. §4423.

Contrary to the situation prevailing with income tax returns, 26 U. S. C. §6103, and census reports, 13 U. S. C. §§8, 9, restrictions on access to the wagering tax returns are not imposed and the returns are not treated as confidential.⁷ The I. R. S. district director is required by law to maintain for public inspection a listing of all who paid the special occupational tax. 26 U. S. C. §6107. Moreover, the taxpayer must post the occupational tax stamp "conspicuously" in the place of his activity or keep it on his person. 26 U. S. C. §6806(c). Even a non-willful violation of the posting provision results in a penalty. 26 U. S. C. §7273(b).

And the wagering tax law specifically provides that payment of the tax does not exempt the taxpayer from any federal or state penalty imposed on the same activity nor prohibit any state from taxing the same activity. 26 U. S. C. §4422.

It is against this framework of the federal wagering tax laws operating upon basically illegal activity that petitioner asserts his privilege against self-incrimination. To view this case, as the Government would (*Govt. Br., Grosso v. U. S.* 10), as presenting a federal-state conflict in which a state seeks to drain the United States treasury by affixing the criminal label to generally legal activity is to ignore the nature of the activity taxed and the operation of the wagering tax laws.

⁷ This was specifically recognized in *Irvine v. California*, 347 U. S. 128, 130 (1954), where the Court said:

"This statute does not make such records or stamps confidential or privileged but, on the contrary, expressly requires the name and place of business of each such taxpayer to be made public."

Contrary to the Government's suggestion, petitioner makes no claim that he is exempt from a tax simply because a single state has chosen to make unlawful a particular activity which Congress seeks to tax (*Govt. Br., Grosso v. U. S.* 10); he does not suggest that activity is exempt from taxation solely because it is, or may be, illegal under state and federal law. But when a tax law is so drafted that the tax cannot be paid without disclosures from the taxpayer which have a manifest tendency to incriminate him, it violates his privilege against self-incrimination.

The Government, then, wrongfully sanctifies the need-for-revenue issue⁸ in a supremacy context. In fact, petitioner

⁸ One commentator has noted:

"Only with difficulty can one find here a bona fide purpose to raise revenue." Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 158 (1966).

In its letter to the Court, the Government has estimated the amount of revenue raised by both wagering taxes (Solicitor General's letter dated January 23, 1967). Although the total amount raised since 1952 is listed as \$105,988,000; the total from the special occupational tax of the type involved in this case is not listed separately by the Government and since 1952 amounts to only \$10,619,197. COMM. OF INT. REV. ANN. REP. (1952-1966).

The Government estimates that the cost of enforcing both of the wagering taxes, including the cost of prosecutions by the Justice Department, amounts to \$27,021,000. Petitioner has no way of analyzing the total expenditures incurred by the I. R. S. because of the special wagering stamp tax. However, the expenditures of the I. R. S. listed by the Solicitor General include only the costs of the Intelligence Division. Petitioner does point out that the expenses of other I. R. S. divisions, such as the Collection Division, the Administrative Division and the Audit Division (see I. R. S. Organization Chart, COMM. OF INT. REV. ANN. REP. 82 (1966)), logically must have some bearing on the total cost incurred in collecting, as well as enforcing, the wagering taxes. These costs were not included in the Solicitor General's determination.

makes no objection whatsoever to the payment of income tax upon the wagering activity here involved. As the Government concedes, the income tax return "permits reporting of income without specific identification of source" (Govt. Br. 22, n. 21).⁹ It is because the special occupational tax and registration admit of no such non-incriminating payment that they violate the taxpayer's privilege against self-incrimination.

The issue of this case is not whether illegal activity can be taxed, but whether the special occupational tax and registration operate—against the background here surveyed—to compel disclosures which deprive petitioner of his constitutional privilege against self-incrimination—a privilege recognized by this Court as "one of the great landmarks in man's struggle to make himself civilized." *Ullmann v. United States*, 350 U. S. 422, 426 (1956).

In any event, even the amount claimed by the Government to have been collected falls far short of the \$400,000,000 a year estimated by the Senate as the revenue from this tax:

"Actual collections of the tax have never amounted to over 2.5% of the Senate's estimate . . . The explanation would seem to be either that the Senate grossly miscalculated gambling activity in our nation, or that it attempted to cloak the penalty nature of the tax. The latter seems more probable." Note, 5 DUKE L. J., *supra* at 88 n. 12.

⁹ The Government recognizes, as indeed it must, "a clear distinction between the matters involved here—registration and filing of a wagering tax return—and the filing of an income tax return . . ." (Govt. Br. 22, n. 21). As the Court held in *Albertson*, "In *Sullivan* [*United States v. Sullivan*, 274 U. S. 259 (1927)] the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities." *Albertson v. Subversive Activities Control Board*, *supra*, 382 U. S. at 79.

I.

The Required Records Doctrine Announced In The Shapiro Case Has No Relevance To The Validity Of The Special Occupational Tax And Registration Requirements Of 26 U. S. C. §§4411, 4412 In The Posture Of This Case.

As the Government recognizes:

"... there is no need for the Court presently to consider any possible relationship between the privilege against self-incrimination and the so-called 'required records' doctrine, see *Shapiro v. United States*, 335 U. S. 1. No such issue is involved on the facts of this case" (Govt. Br. 25).

Although recognizing the potential conflict between the doctrine and petitioner's claim of privilege, petitioner concurs on the basis of this Court's more recent decisions that the required records doctrine of *Shapiro* is not applicable to this case.

In *Shapiro*, the defendant, a licensee under O. P. A. food regulations, was served with a subpoena directing him to produce certain records which O. P. A. regulations required him to keep. The Emergency Price Control Act provided that the privilege against self-incrimination was not an excuse for non-compliance with the requirements of the act, but made the provisions of an earlier immunity statute available to any individual specifically claiming the privilege.

Shapiro, after claiming his constitutional privilege and his immunity, produced the subpoenaed records, which were

later used as evidence against him in a prosecution for illegal, tie-in sales. This Court affirmed in a 5-4 decision.

Primarily at issue before the Court was the "important question of statutory construction" regarding the scope of the immunity provision. 335 U. S. at 4. Although noting that the immunity provision would extend to oral testimony, the Court held that it did not bar the prosecution based on written records. The Court then considered the constitutional issue which had "not [been] duly raised by petitioner." 335 U. S. at 32.

At the threshold, the Court emphasized "that there are limits which the government cannot constitutionally exceed in requiring the keeping of records." 335 U. S. at 32. Without setting forth those limits, the Court concluded by reliance upon an earlier dictum in *Davis v. United States*, 328 U. S. 582, 589-590 (1946), that the

"privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'" 335 U. S. at 32-33.

To ignore the "limits" recognized, but not defined, in *Shapiro*, is to endorse "the notion that because a disclosure is required the privilege does not apply", a notion which, "if extended to its full logical reach, is capable of entirely destroying the privilege." Mansfield, 1966 SUP. CT. REV., *supra* at 148.

Perhaps the most significant limitation upon the required records rule is the doctrine in *Albertson* that the privilege

prevents registration which would brand any registrant as a probable criminal. *Albertson*—decided without any reference to *Shapiro*, by either the Court or any of the parties—established the supremacy of the privilege over the quest for information when the “area [is] permeated with criminal statutes . . .” *Albertson v. Subversive Activities Control Board*, *supra*, 382 U. S. at 79.

As one recent comment summarizes:

“What the government cannot do is compel information under one statute which necessarily admits the violation of an unrelated criminal statute: this is the essence of self-incrimination.” Comment, *Self-Incrimination and the Federal Excise Tax on Wagering*, 76 YALE L. J. 839, 847 (1967).

Consistent with this limitation, lower courts have invalidated the registration of firearms where it brings the unlawful act of possession to the attention of the Government. *Russell v. United States*, 306 F. 2d 402 (9 Cir. 1962), and the requirement for reporting sales of illegal gambling devices, *United States v. Ansani, et al.*, 138 F. Supp. 451 (N. D. Ill. 1955), *aff'd* 240 F. 2d 216 (7 Cir.), *cert. denied*, 353 U. S. 936 (1957). As the *Ansani* court said:

“To say that these required reports [regarding gambling devices] become public documents is to erase the Fifth Amendment from the Constitution.” 138 F. Supp. at 454.¹⁰

¹⁰ The court further explained:

“The problem here, as I see it, is as simple as it would be if all burglars, for example, were required to file monthly reports of burglaries perpetrated during the preceding month, together with an inventory of all stolen goods. Such a requirement

The *Albertson* doctrine—that the Congress can enact no registration requirement which compels disclosure of information in an area composed of essentially criminal activity—perhaps explains the minimal mention of *Shapiro* in *Kahriger* and total lack of reference to it in *Lewis*. If *Shapiro*, decided only five years prior to *Kahriger*, had any vitality in the wagering tax law context, the Court in *Kahriger* need not have adopted the Wigmore proposition regarding prospective operation of the privilege. Rather, it could have applied the recently enacted required records doctrine, instead of inserting a scant footnote direction to compare the *Kahriger* holding to the *Shapiro* doctrine. 345 U. S. at 33, n. 13.

By recognizing the limitation articulated in *Albertson* and the Government's present lack of reliance upon the required records doctrine, the Court need not face the task of determining whether the broader interpretation of *Shapiro* destroys the privilege.¹¹ But should the Court feel that

would certainly simplify the apprehension and prosecution of burglars; but it would be repugnant to the Fifth Amendment to our Constitution, of the United States." 138 F. Supp. at 454.

¹¹ There is less justification to consider the application of the doctrine in this case than there was in *Clancy v. United States*, 365 U.S. 312 (1961). In *Clancy*, the court of appeals sustained the application of the required records doctrine in the wagering tax context on the basis of *Shapiro*. *Clancy v. United States*, 276 F. 2d 617, 631 (7 Cir. 1960). Although the Government relied on *Shapiro* in opposing certiorari, it told this Court in its brief on the merits that it would not rely on the required records doctrine. Brief for United States 37.

Moreover, the Court—which applied the required records doctrine for the first and last time in *Shapiro*—has not yet even decided whether the required records doctrine applies to tax records of any kind. Duke, *Prosecutions for Attempt to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L. J. 1, 43 (1966). Prior to *Shapiro* "very few questioned the view that a taxpayer's private records were protected by the Fourth and

Shapiro's broad view—that the privilege is lost when records are required by law to be kept—is relevant to this case, petitioner urges that *Shapiro* be abandoned. For two of the “shaky foundations upon which the *Shapiro* decision was raised,” Mansfield, 1966 SUP. CT. REV., *supra* at 148, have recently been set aside by the Court.

One basis for the *Shapiro* result was a distinction between “writings whose keeping as records has . . . been required” and “oral testimony,” with the privilege applying only to the latter. 335 U. S. at 27. But that basis was rejected in *Albertson*, where the Court held that such a distinction makes no “difference for constitutional purposes.” 382 U. S. at 78.

A second, since-undermined basis for *Shapiro* was the notion that the incriminating records could be required as a condition for engaging in the wholesale grocery business, activity available to Shapiro “solely by virtue of the license granted to him under the statute.” 335 U. S. at 35. But only last Term in *Garrity v. New Jersey*, 385 U. S. 493. (1967), the Court invalidated the use of a confession obtained under the threat of removal from office with these words:

“The choice given appellants was either to forfeit their jobs or to incriminate themselves. Their option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.” 385 U. S. at 495-496.

Fifth Amendments. A long line of cases defining these constitutional protections had operated on the unspoken assumption “that a taxpayer could not be forced to reveal incriminating information . . .” Redlich, *Search, Seizures, and Self-Incrimination in Tax Cases*, 10 TAX L. REV. 191, 192 (1954).

Shapiro, then, insofar as it holds that a licensee's right to a livelihood can be conditioned upon abandonment of Fifth Amendment rights, is contrary to *Garrity*.

With these foundations removed, *Shapiro's* broad view does not survive this Court's recent decisions and petitioner urges its rejection so as not to cloud the privilege which reflects our "most noble aspirations." *Murphy v. Waterfront Commission of New York*, 378 U. S. 52, 55 (1964).

II.

An Obligation To Pay A Special Occupational Tax Required By 26 U. S. C. §4411 Cannot Be Satisfied Without Filing The Registration Statement Provided For By 26 U. S. C. §4412.

That the special tax required by 26 U. S. C. §4411 cannot be paid without filing the registration statement provided for by 26 U. S. C. §4412 is clear from the statutes themselves, the case law, the legislative history and the practice of the Service. It is conceded by the Government. As one recent comment states:

"A gambler cannot pay the tax without registering and providing the required information; it is therefore impossible to comply without revealing incriminating information." Comment, 76 YALE L. J., *supra* at 840.

One of the two provisions directly involved in petitioner's case, 26 U. S. C. §4412, specifically provides that any person paying the special occupational tax "shall register . . . with the officer in charge," his name and place of business, the name and address of his agents and the name and ad-

dress of his principals. By virtue of 26 U. S. C. §6001, petitioner, if a "person liable for any tax . . . [would have to] . . . make such returns, and comply with such rules and regulations as the secretary or his delegate may from time to time prescribe . . .," and 26 U. S. C. §6011(a) provides, ". . . every person required to make a return or statement shall include therein the information required by such forms or regulations."

As indicated by the cases, the fact that a tendered payment of the special occupational tax is refused is no defense to a subsequent prosecution for non-payment of the special tax. *United States v. Mungoli*, 233 F. 2d 204, 205 (3 Cir. 1956), *cert. denied*, 352 U. S. 828 (1957); *United States v. Whiting*, 311 F. 2d 191, 193 (4 Cir. 1962); *Holren v. Schneider*, 101 F. Supp. 531 (D. C. 1951), *aff'd* 342 U. S. 939 (1952). As the Third Circuit said in *Mungoli*, even if the defendant had "tendered payment of the tax before accepting wagers," his "claim of the privilege against self-incrimination would be totally lacking in substance." 233 F. 2d at 205.

Clearly, it was the intent of Congress that payment of the special occupational tax without registration not be possible:

" . . . the bill provides that a person who pays the occupational tax *must*, as part of his registration, identify those persons who are engaged in receiving wagers for or on his behalf, and, in addition, identify the persons on whose behalf he is engaged in receiving wagers." ¹² (Emphasis added.)

¹² H. R. REP. 586, 82d Cong., 1st Sess. 60; S. REP. 781, 82d Cong., 1st Sess. 118 (1951).

The Internal Revenue Service has also recognized that registration must accompany payment of the occupational tax. The regulations provide that Form 11-C, which is the return by which the special occupational tax is paid, shall be filed prior to engaging in activity which makes the taxpayer responsible for the occupational tax. 26 C. F. R. §44.6071-1(b). And former Commissioner Caplin has stated:

"Everyone liable for the annual \$50 occupational tax is required to register his name and the address of his place of business with the appropriate district director of the Internal Revenue." Caplin, *The Gambling Business and Federal Taxes*, 8 CRIME AND DELINQUENCY 371, 375 (1962).

Moreover, the Government, in attempting to distinguish the means of payment of the excise tax from the means of payment of the special occupational tax admits, "that the occupational tax . . . requires registration—the two are accomplished through filing of a single form" (Govt. Br., *Grosso v. U. S.* 14 n. 10).

Here, then, as in *Albertson v. Subversive Activities Control Board*, *supra*, 382 U. S. at 78, "nothing in the Act or regulations permits less than literal and full compliance with the requirements of the form. . . ."

Even if the requirements of 26 U. S. C. §4411 could be satisfied without registration—and, as noted, it is uniformly recognized that this cannot be accomplished—payment of the special occupational tax in the statutory scheme here involved, 26 U. S. C. §§4411, 4901(c), 6107, 6806(e), would be an act of a "communicative nature," *Schmerber v. Cali-*

for¹³nia, 384 U. S. 757, 761 (1966), and would be incriminating. One jurisdiction has made possession of the special occupational tax stamp—which 26 U. S. C. §6806(c) requires to be “conspicuously” posted—an offense if the holder has the requisite intent. *Kansas City v. Lee*, — Mo. —, 414 S. W. 2d 261, *appeal docketed*, 1 Cr. L. REP. 2235 (1967). Another imposes a maximum fine of \$50 for each day one possesses the special occupational tax stamp without regard to intent. *Deitch, et al. v. City of Chattanooga*, 195 Tenn. 245, 258 S. W. 2d 776 (1953).

Assuming that these offenses making possession of the wagering tax stamp illegal are legislative aberrations, the payment of the special occupational tax pursuant to the statutory scheme employed here¹³ results in “risks of incrimination . . . [which] are obvious . . .” *Albertson v. Subversive Activities Control Board*, *supra*, 382 U. S. at 77. Since it subjects the taxpayer’s name and address to public inspection, 26 U. S. C. §6107, and requires him to “conspicuously” display his special occupational tax stamp, 26 U. S. C. §6806(c), payment of the special occupational tax, even without registration, ““cannot possibly have . . . [anything but a] . . . tendency to incriminate,”” *Malloy v. Hogan*, 378 U. S. 1, 12 (1964). It clearly furnishes, at least, “a link in a chain of evidence needed to prosecute.” *Hoffman v. United States*, 341 U. S. 479, 486 (1951).

¹³ The Government states that in the area in which this tax operates payment cannot be anonymous: “Certainly a tax scheme could not be administered without the government’s obtaining the name and address of those paying the tax” (Govt. Br., *Grosso v. U. S.* 8).

III.

The Special Occupational Tax And Registration Violate Petitioner's Privilege Against Self-Incrimination Guaranteed By The Fifth Amendment, Requiring The Overruling Of The *Kahriger* And *Lewis* Cases.

The Government urges this Court to recognize a continued vitality in the *Kahriger-Lewis* rationale (Govt. Br. 14-15). In this regard it refrains from (1) measuring the *Kahriger-Lewis* doctrine against the scope of the privilege, as defined both before and after *Kahriger* and *Lewis* and (2) examining the sole cited authority in *Kahriger*—a single citation to Professor Wigmore's treatise—for the proposition that the privilege relates only to past acts.¹⁴

¹⁴ "The Court's rule that the privilege was applicable only to admissions of past acts rested on a questionable citation to Professor Wigmore and the theory of implied waiver. Wigmore's analysis, however, was based on cases denying the privilege to druggists who were required to report liquor sales and pawnbrokers required to record pledges. The activities of pharmacy and pawnbroking are a 'generic class of acts,' legal in themselves; the criminality of the particular activity reported is 'due to the party's own election, made subsequent to the origin of the duty' to report or record the information. Since *gambling* and the transfer of *marijuana* are *illegal per se* under the laws of most states, Wigmore's analysis would not seem to compel the holding of the Court. Further, the basis of Wigmore's conclusions, cited with approval by the Court in other cases, was the presumption that the party waived his constitutional right by the decision to pursue an otherwise legal activity in an illegal manner. A similar approach is suggested in the *Lewis* case where the Court, emphasizing the lack of compulsion, asserted that the gambler is free to forgo his illegal activity before signing the government blank. In the registration situation, however, as in the record-keeping cases, the waiver argument begs the question: To be sure, the government can exclude the citizen from many activities by declaring the particular conduct illegal; every would-be criminal is, at the threshold, free to choose whether to commit the illegal act. But his decision to commit that act does

Rather the Government emphasizes *Lewis'* language that "there is nothing compulsory about" the wagering tax act because there is no "constitutional right to gamble" (Govt. Br., *Grosso v. U. S.* 17).

As to the non-compulsory contention, Professor Mansfield has pointed out:

"It is clear that this argument must be rejected and that the privilege cannot be considered forfeited in these circumstances because of the fact of choice. . . . To hold that since the defendant made a choice to commit the primary offense the privilege is lost would be to abolish the privilege in one of its central applications, to abolish it in cases in which it has always historically applied, to defeat its very purpose . . . This is true even though the defendant had no right to choose as he did, no right to commit the primary offense. The privilege is designed to provide protection even for those who have chosen to commit crime." Mansfield, 1966 Sup. Ct. Rev., *supra* at 130-131.

And as to the projected constitutional right to gamble, he states:

"Of course he [petitioner] had no right to gamble. That is to say, he could be punished for the act of gambling. . . . The fact that an activity is already prohibited as criminal does not necessarily mean that any

not imply a choice to relinquish protections guaranteed by the Constitution to all citizens. Once such a decision has been made, the courts must still determine whether the government can conscript the aid of the individual in attempting his conviction." Note, *Required Information and the Privilege Against Self-Incrimination*, 65 Col. L. Rev. 680, 689-90 (1965). (Emphasis added.)

and all means may be used to deter it or to bring about the detection and prosecution of violators. It is not absurd to say that a person who has no right to do an act nevertheless has a right not to answer questions about his intention to do the act when the purpose of the questions is to facilitate his prosecution for doing the act." Mansfield, 1966 SUP. CT. REV., *supra* at 155.

If, on the day petitioner should have paid the special occupational tax and registered, he was asked, before a grand jury, court or other tribunal, whether he intended to accept wagers for himself or others, he most certainly could have invoked the Fifth Amendment privilege. Of this, there would seem not the slightest doubt because of the possibility of incrimination under state and federal law.¹⁵

¹⁵ As to state law, former Commissioner of the Internal Revenue Service Caplin stated:

"The dilemma of the bookmaker is apparent. If he registers and pays the wagering taxes, he is generating evidence of his gambling activities—evidence that is available to local authorities. If he does not register, he exposes himself to the sanctions and penalties contained in the federal wagering tax laws." Caplin, 8 CRIME AND DELINQUENCY, *supra* at 375.

As to federal law, the possibility of incrimination is likewise clear, notwithstanding the Government's contention that there "is no danger of federal prosecution" (Govt. Br. 19). In a decision announced since the first argument in this case, the Court of Appeals for the Sixth Circuit upheld a conviction for receiving a sports publication through the mail, in violation of the law proscribing interstate and foreign travel or transportation in aid of racketeering enterprises, 18 U. S. C. §1952. Said the court:

"Appellant's contention that his extra-judicial admission to Agent Norwood cannot be considered because they were uncorroborated, *United States v. Calderon*, 348 U. S. 160, 75 S. Ct. 186, 99 L. Ed. 202 is unfounded. Substantial evidence to corroborate such admissions is found in appellant's possession of Federal Wagering Tax Stamps and his filing of monthly Wagering Excise Returns . . . " *United States v. Ross*, 374 F. 2d 227, 229-230 (6 Cir. 1967).

Since *Kahriger* and *Lewis*, the distinction between oral and written responses, as noted, has been forthrightly rejected. *Albertson v. Subversive Activities Control Board*, *supra*, 382 U. S. at 78. And the link-in-the-chain principle ignored in those cases has been re-established. *Malloy v. Hogan*, *supra*, 378 U. S. at 11. The reasoning of *Kahriger* and *Lewis*, then, fails to survive the recent pronouncements of this Court.

IV.

The Use-Restriction Rule Urged By The Government In The Event The Special Occupational Tax And Registration Are Held To Violate The Fifth Amendment Privilege Is Not Justified In This Case.

In its alternative argument, the Government proposes that the Court abandon the traditional "right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will," *Malloy v. Hogan*, *supra*, 378 U. S. at 8, and urges a rule that would restrict the use of information disclosed by the wagering tax laws (Govt. Br. 19-27).

Since the original briefs were filed in this case, the Court has again acted so as to reject the argument proposed by the Government. In *Spevack v. Klein*, 385 U. S. 511 (1967), the Court held it improper to penalize by disbarment an attorney who failed to produce written records pursuant to a *subpoena duces tecum*, thus upholding the right to silence as a proper invocation of the Fifth Amendment privilege. If the Government's contention be sound, *Spevack*

was wrongly decided: *Spevack*, under the Government's notion, should have provided on remand for compliance with the subpoena and exclusion from use of the material disclosed. But this the Court did not do.

At least one lower court has forthrightly rejected the Government's immunity-from-use-argument, since the original argument in this case. In *United States v. Chandler*, — F. 2d —, — (2 Cir. 1967), in language equally applicable here, a unanimous court of appeals held:¹⁶

"The Government, citing *Murphy v. Waterfront Commission*, 378 U. S. at 79, also tells us to 'remember that . . . incrimination cannot result from an answer given in response to a Court's direction. Such an answer is involuntary—indeed it is coerced—and therefore never can be used against the declarant.' But the portion of the opinion cited dealt with the problems of adjustment in federal-state relationships when incriminating testimony is compelled under a state immunity statute. No such statute, state or federal, is invoked here, and no suggestion of possible immunity was even hinted at in questioning the witness. Cf. *Stevens v. Marks*, 383 U. S. 234 (1966). Moreover, absent a grant of immunity, restricted treatment of a coerced disclosure, see *United States v. Blue*, 384 U. S. 251 (1966), is not a substitution of an exclusionary rule for the right to remain silent; rather it is an effort to limit the effect of prior wrongfully compelled testimony. See Mansfield, *The Albertson Case*:

¹⁶ The Government, which originally argued here that the use-restriction rule did not apply to oral testimony (Govt. Br. Grosso v. U. S. 13-14), has been quick to expand its use-restriction rule to oral testimony. *Chandler* involved a recalcitrant witness at a federal criminal trial.

Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information, in 1966 Supreme Court Review 103, 162. To argue, therefore, that refusal to answer under an erroneous order is contemptuous puts the cart before the horse. Indeed, if this reasoning were controlling, the privilege to remain silent need never be observed."

Professor Mansfield has suggested a potential evil in the argument the Government advanced here:

"It may turn out that the theory of protection from prosecutory use is simply a cloud of words behind which the substance of the privilege is lost. This may be true even though it is laid down that in any prosecution brought against a person who was required to disclose incriminating information, the government has the burden of showing that its evidence was obtained independently of the compelled disclosure. *As a practical matter, will it be possible to determine whether the government's evidence was obtained independently?* Suppose the evidence used to convict has no causal connection with the compelled disclosure other than that it provided the reason for commencing an investigation? . . . The upshot of a rule restricted to forbidding prosecutory use may be that a person is in fact much worse off in regard to the danger of prosecution and conviction than if he had remained silent." Mansfield, 1966 SUP. CT. REV., *supra* at 165. (Emphasis added.)

The Government's proposed exclusionary rule, then, cannot be applied here without dilution of the privilege. The

Government argument to the contrary ignores, *inter alia*, the results in recent cases and is based upon a false distinction between oral and written inquiries.

Conclusion

By its limited grant of certiorari the Court has agreed to re-examine its earlier holdings that the wagering tax laws do not operate to deny the privilege against self-incrimination. Petitioner maintains that, even if Congress does not encroach upon the power of the states in enacting a revenue measure, it cannot provide for a tax scheme which necessarily runs afoul of the Fifth Amendment. We are not here dealing in an area where a state has chosen to make unlawful a particular activity which Congress seeks to tax; rather we are here involved in an area where almost all of the states and the Congress have chosen to make a host of activities unlawful.

To hold that Congress, without violating the Fifth Amendment, can enact a tax scheme which requires the taxpayer to confess, among other things, to whether or not he is engaged in the business of accepting wagers—in view of the fact that wagering in this country is an area saturated with criminal offenses—is to run roughshod over “the tradition of the broad protection given the privilege,” *Spevack v. Klein*, *supra*, 385 U. S. at 515.

Petitioner does not minimize the significance of the national revenues in our society. But if the wagering tax laws are upheld here, Congress need only provide a registration fee to validate against Fifth Amendment objection the regulatory scheme unanimously overturned by this Court in the *Albertson* case.

For these reasons, then, the judgments of the court below should be—and petitioner requests that they be—reversed with directions to enter judgments of acquittal.

Respectfully submitted,

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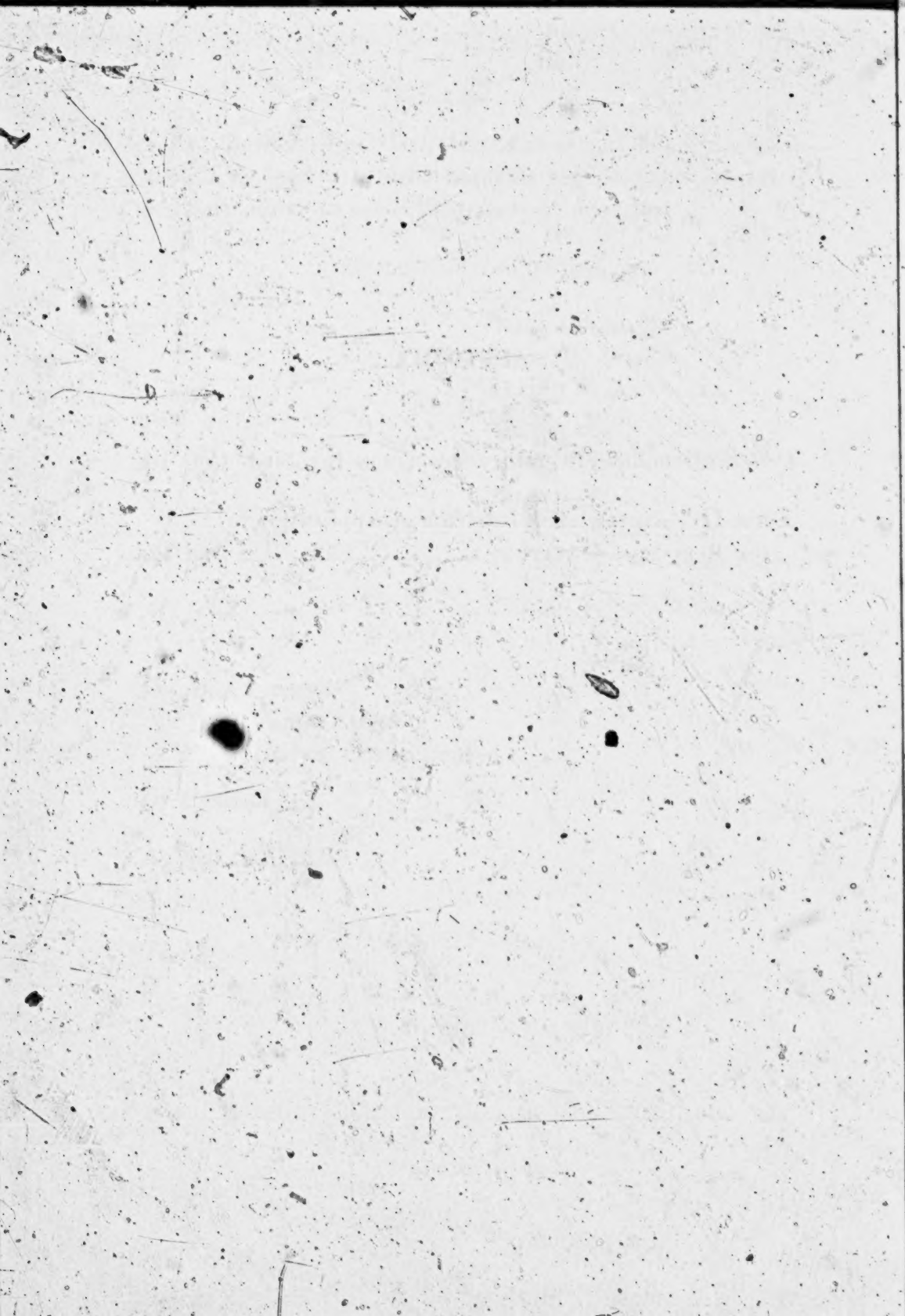
August 23, 1967.

APPENDIX

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**Form 11C—Special Tax Return and Application
for Registry—Wagering11a and 12a**



APPENDIX

Constitutional and Statutory Provisions Involved

Amend. V, U. S. Const.: *Capital Crimes; Double Jeopardy; Self-incrimination; Due Process; Just Compensation for Property*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INT. REV. CODE OF 1954, §4401: *Imposition of tax*

(a) Wagers—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a

separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) *Persons liable for tax*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

INT. REV. CODE OF 1954, §4402; *Exemptions*

No tax shall be imposed by this subchapter—

(1) *Parimutuels*.—On any wager placed with, or on any wager placed in a wagering pool conducted by, a parimutuel wagering enterprise licensed under State law,

(2) *Coin-operated devices*.—On any wager placed in a coin-operated device with respect to which an occupational tax is imposed by section 4461, or on any amount paid, in lieu of inserting a coin, token, or similar object, to operate a device described in section 4462 (a) (2), if an occupational tax is imposed with respect to such device by section 4461, or

(3) *State-conducted sweepstakes*.—On any wager placed in a sweepstakes, wagering pool, or lottery—

(A) which is conducted by an agency of a State acting under authority of State law, and

(B) the ultimate winners in which are determined by the results of a horse race,

but only if such wager is placed with the State agency conducting such sweepstakes, wagering pool, or lottery, or with its authorized employees or agents.

INT. REV. CODE OF 1954, §4403: *Record Requirements*

Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to section 6001(a).

INT. REV. CODE OF 1954, §4411: *Imposition of tax*

There shall be imposed a special tax of \$50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

INT. REV. CODE OF 1954, §4412: *Registration*

(a) Requirement—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

- (1) his name and place of residence;
- (2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

INT. REV. CODE OF 1954, §4421: *Definitions*

For purposes of this chapter—

(1) *Wager*.—The term “wager” means—

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers;

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) *Lottery*.—The term “lottery” includes the numbers game, policy, and similar types of wagering. The term does not include—

(A) any game of a type in which usually

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

INT. REV. CODE OF 1954, §4422: *Applicability of federal and state laws*

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

INT. REV. CODE OF 1954, §4423: *Inspection of books*

Notwithstanding section 7605(b), the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter.

INT. REV. CODE OF 1954, §4901: *Payment of tax*

(a) Condition precedent to carrying on certain business.—No person shall be engaged in or carry on any

trade or business subject to the tax imposed by section 4411 (wagering), 4461(a)(1) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

(b) Computation.—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

(c) How paid.—

(1) Stamp.—All special taxes imposed by law shall be paid by stamps denoting the tax.

INT. REV. CODE OF 1954, §6001: *Notice or regulations requiring records, statements, and special returns*

Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. Whenever in the judgment of the Secretary or his delegate it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, render such statements, or keep such records, as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title.

INT. REV. CODE OF 1954, §6011: *General requirement of return, statement, or list*

(a) General rule.—When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

INT. REV. CODE OF 1954, §6107: *List of special taxpayers for public inspection*

In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of \$1 for each 100 words or fraction thereof in the copy or copies so requested may be charged.

INT. REV. CODE OF 1954, §6653: *Failure to pay tax*

(a) *Negligence or intentional disregard of rules and regulations with respect to income or gift taxes.*—If

any part of any underpayment (as defined in subsection (c) (1)) of any tax imposed by subtitle A or by chapter 12 of subtitle B (relating to income taxes and gift taxes) is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment.

(e) *Failure to pay stamp tax.*—Any person (as defined in section 6671(b)) who willfully fails to pay any tax imposed by this title which is payable by stamp, coupons, tickets, books, or other devices or methods prescribed by this title or by regulations under authority of this title, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of 50 percent of the total amount of the underpayment of the tax.

INT. REV. CODE OF 1954, §6806: *Posting occupational tax stamps*

(e) *Occupational wagering tax.*—Every person liable for special tax under section 4411 shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request, to any officer or employee of the Treasury Department.

INT. REV. CODE OF 1954, §7201: *Attempt to evade or defeat tax*

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

INT. REV. CODE OF 1954, §7203: *Willful failure to file return, supply information or pay tax*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

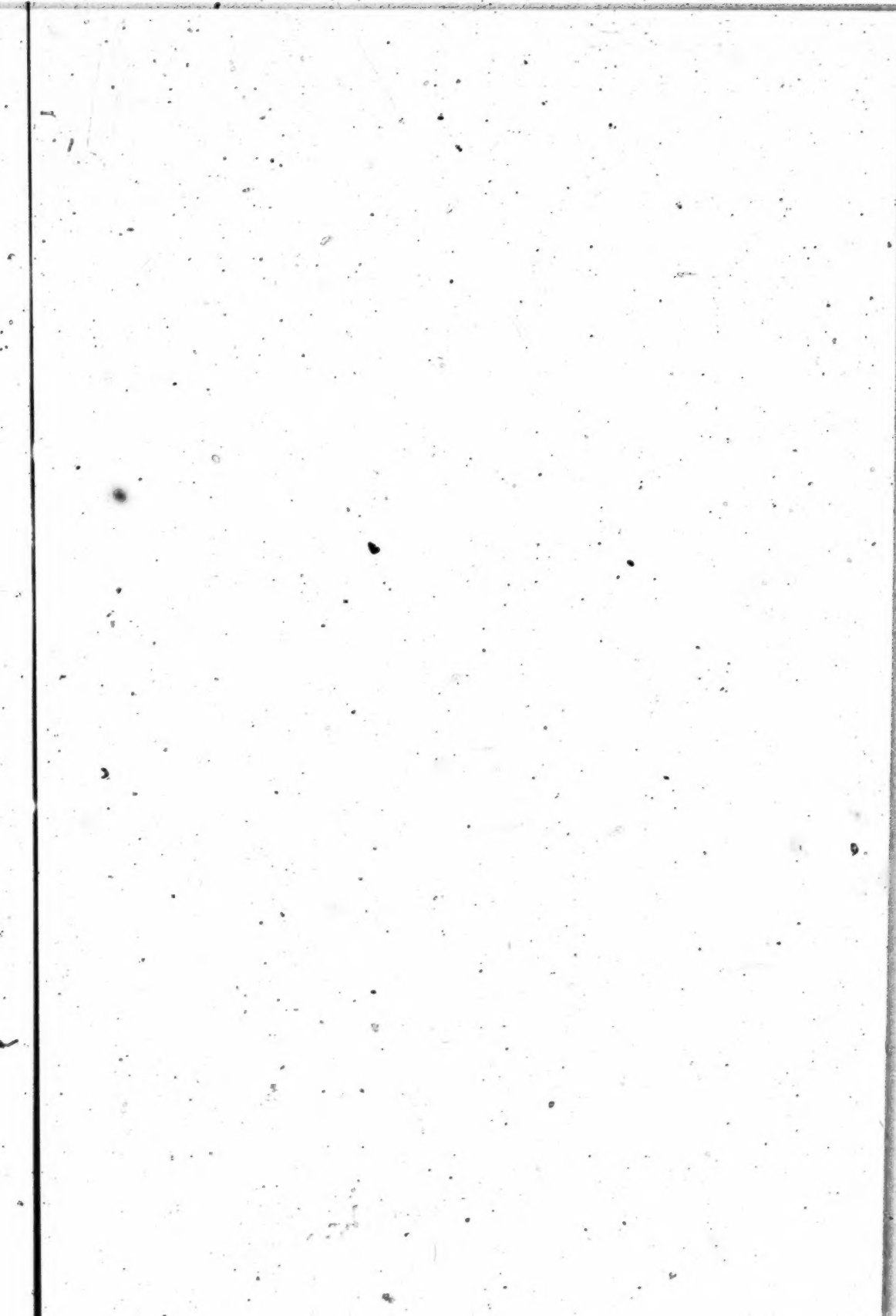
INT. REV. CODE OF 1954, §7262: *Violation of occupational tax laws relating to wagering—failure to pay special tax*

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to

the payment of the tax, be fined not less than \$1,000 and not more than \$5,000.

INT. REV. CODE OF 1954, §7273: *Penalties for offenses relating to special taxes*

(b) *Failure to post or exhibit special wagering tax stamp.*—Any person who, through negligence, fails to comply with section 6806(c) relating to the posting or exhibiting of the special wagering tax stamp, shall be liable to a penalty of \$50. Any person who, through willful neglect or refusal, fails to comply with section 6806(c) shall be liable to a penalty of \$100.



FORM 11-C
Rev. Mar. 1958

U. S. Treasury Department—Internal Revenue Service
SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING
(See Instructions on reverse for time and place for filing return)

Return for period from

(Month, day, and year) to June 30, 19

1. Name: True name

Alias, style, or trade
name, if any

2. Address: Residence

(Number and street)

(City)

(County)

(State)

Business

(Number and street)

(City)

(County)

(State)

3. If this is merely an application for registry with which no remittance of tax is required, please explain and give your Special Tax Stamp No. and Registration No. (see instruction 2)

Tax \$
Penalty \$
Interest \$
Total \$

Make remittance payable to the Internal Revenue Service. Payment may be made by cash, check or money order.

4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

(If additional space is required for items 4, 5 (a), 5 (c), or 6, attach additional sheets, identifying each entry as to item number.)

True name

Title

Home address

5. Are you engaged in the business of accepting wagers on your own account? ☐ Yes ☐ No
If yes, complete (a), (b), and (c) of this item.
(Check one)

(a) Name and address where each such business is conducted.

Name of location

Street address

City and State

(b) Number of employees and/or agents engaged in receiving wagers on your behalf

(c) True name, current address, and special tax stamp number of each such person.

True name

Special stamp No. in present use

Street address

City and State

6. Do you receive wagers for or on behalf of some other person or persons? ☐ Yes ☐ No
If yes, give true name and address of each such person.
(Check one)

True name

Street address

City and State

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

(Date) 19

(Signature)

(State whether individual owner, member of firm, or if corporation officer, give title)

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 2

JAMES MARCHETTI, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

No. 12

ANTHONY M. GROSSO, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

BRIEF FOR THE UNITED STATES ON REARGUMENT

STATEMENT

Both of these cases were argued last Term, and present closely related questions involving the constitutional validity of the federal wagering tax laws (26 U.S.C. 4401 *et seq.*). *Marchetti* involves a conviction for failure to register and pay the fifty-dollar special occupational tax on persons engaged in the business of accepting wagers, as required by 26 U.S.C. 4411, 4412.¹ Certiorari was granted in *Marchetti* limited to the question whether "the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment," so that the Court, "especially in view of its recent decision in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), [should] overrule *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955)" (385 U.S. 1000). *Grosso* involves a conviction for failure to pay the ten-percent excise tax on wagers imposed by 26 U.S.C. 4401, in addi-

¹ Certiorari was initially granted in *Costello v. United States* (383 U.S. 942). Petitioner Costello died in December 1966. On January 9, 1967, the Court granted certiorari in *Marchetti* (385 U.S. 1000), a companion case, and set it down for argument in lieu of *Costello*, which has been held in abeyance (No. 3, this Term). Because of the shortness of time before oral argument, and since the cases were virtually identical (petitioners in the two cases were tried and convicted together), the record and the government's brief in *Costello* were used in *Marchetti*. In both *Costello* and *Marchetti* the grant of certiorari was limited to the question of the constitutionality of the wagering tax provisions under the Fifth Amendment's privilege against self-incrimination.

tion to failure to pay the special occupational tax. Thus, the principal question presented for determination in *Grosso* is whether the excise tax on wagering violates petitioner's Fifth Amendment privilege against self-incrimination.²

On June 12, 1967, the Court restored these two cases to the docket for reargument this Term (388 U.S. 903, 904), and requested counsel to discuss, in addition to the question previously specified, the following questions:

In *Marchetti*:

(1) What relevance, if any, has the required records doctrine, *Shapiro v. United States*, 335 U.S. 1, to the validity under the Fifth Amendment of the registration and special occupational tax requirements of 26 U.S.C. §§ 4411, 4412?

(2) Can an obligation to pay the special occupational tax required by 26 U.S.C. § 4411 be satisfied without filing the registration statement provided for by 26 U.S.C. § 4412?

In *Grosso*:

(1) What relevance, if any, has the required records doctrine, *Shapiro v. United States*, 335 U.S. 1, to the validity under the Fifth Amend-

² A separate question, relating to the propriety of the trial judge's treatment of a note from the jury, was raised in the petition for certiorari in *Grosso*, and the Court's grant of certiorari was not limited to the self-incrimination issue (385 U.S. 810). We refer the Court to our previous brief for the government's position on this question (see *Govt Grosso Br.* 30-34), and include no further discussion of this point in the instant brief.

ment of the obligation to pay the wagering excise tax imposed by 26 U.S.C. § 4401?

(2) Is satisfaction of an obligation to pay a wagering excise tax imposed by 26 U.S.C. § 4401 conditioned upon the filing of a return required under 26 U.S.C. § 6011 and pertinent regulations? If it is not, what information, if any, must accompany the payment of a wagering excise tax obligation in order to extinguish the taxpayer's liability for that obligation?

Since our basic position in these cases rests essentially upon a common foundation, we treat both in this single brief. To the extent that there are differences which raise divergent considerations, we will make this clear in the course of our discussion. The instant brief is substantially limited to the questions specified in the Court's reargument orders, although we do attempt here to develop more extensively some of the points made previously. For a full development of the government's position and a discussion of the other aspects of the two cases, we respectfully refer the Court to our briefs filed last Term (herein referred to as "Govt *Costello* Br." and "Govt *Grosso* Br.").

SUMMARY OF ARGUMENT

The "required records" doctrine of *Shapiro v. United States*, 335 U.S. 1, is not, in the government's view, directly applicable in the instant cases. That doctrine relates to records which are required to be kept as distinguished from reports which are required to be filed with the government. Such rec-

ords are not, as a general matter, directly testimonial, and cannot become incriminatory unless production is demanded and their contents analyzed. Reports—such as registration statements and tax returns—involve, on the other hand, an affirmative declaration of certain specified information and must be filed periodically, rather than simply maintained in the routine and ordinary course of conducting a business. *Shapiro* may relate to the daily record of wagers required to be kept under 26 U.S.C. 4403, but no such records are involved in the instant cases.

Shapiro is not wholly irrelevant here, however, since it stands for the proposition that, in appropriate situations, some accommodation between the government's need for information and the scope of the privilege against self-incrimination is proper. Self-reporting accompanied by some disclosure is a bedrock concept in our tax structure, and has considerable relevance in non-tax areas as well. A majority of this Court has consistently chosen the path of accommodation between the government's need for information and the privilege. The rationale of *Kahriger* and *Lewis*, properly considered, reflects such an accommodation, as do *Shapiro* and *Murphy v. Waterfront Commission*, 378 U.S. 52. Since an individual's entering into the gambling business is a matter of choice, there is nothing coercive about attaching federal tax conditions on his engagement in that business. The holding in *Albertson* is distinguishable since here the registration and return requirements serve a legitimate governmental interest sepa-

rate and independent from a concern with the underlying activity as such, and seek only a minimal amount of information necessary for the collection of taxes.

Gambling is a large-scale and thriving business in this country, although illegal in most places, and thus is a proper subject for excise taxation. Congress enacted the wagering tax as a revenue measure, and it has in fact produced a significant amount of revenue. Because Congress can properly tax gambling does not mean that it could similarly tax any and all illegal activities. Gambling is an ongoing and continuing business, is organized and run like other businesses, and has customers and employees—unlike sporadic criminal activities such as kidnapping and robbery.

The income tax situation involved in *United States v. Sullivan*, 274 U.S. 259, is doubtless distinguishable from the instant cases. Yet a challenge to the rationale of *Sullivan*, as spelled out in *Albertson*, is a predictable sequel to a decision overruling *Kahriger* and *Lewis*. Such a decision, if rendered, should therefore be predicated on a ground which will not impair the viability of *Sullivan*. If *Kahriger* and *Lewis* are not followed, adoption of a use-restriction rule, like that in *Murphy*, would achieve this result and would uphold the exercise of the taxing power while fully protecting the privilege.

No incrimination can result if information required to be disclosed cannot be used in a subsequent criminal prosecution. What we alternatively suggest is a rule prohibiting the use of any

compelled information, directly or indirectly, in a later prosecution, State or federal, relating to the underlying gambling activity made subject to the wagering tax. Such a rule would not amount to the judicial creation of an immunity statute. All that need be adopted in the instant cases is a use-restriction rule of narrow and limited applicability, since there is a clear governmental interest in obtaining the information, only a minimal disclosure is sought, and the governmental interest stems from the taxing power and does not reflect primarily a concern with the underlying activity involved. Under such a rule the privilege will be fully protected, for the burden will be on the prosecution to show an independent source for its information when it proceeds criminally against one who has complied with the wagering tax laws.

Finally, the government does not contend that the obligation to pay the special occupational tax and the wagering excise tax can be satisfied without filing the required registration statement and tax return. This approach is required by the pertinent statutory provisions, and reflects the current Treasury regulations and administrative practice. Enforcement of any tax measure necessitates the obtaining of a certain amount of information about those subject to the tax. The minimal amount of information sought under the wagering tax statutes is essential to the collection of the prescribed taxes.

ARGUMENT

I. The Government Does Not View the "Required Records" Doctrine of *Shapiro v. United States* as Directly Applicable in the Instant Cases

In *Shapiro v. United States*, 335 U.S. 1, this Court held that a wholesale fruit and produce dealer, licensed to do business under the Emergency Price Control Act, and required by O.P.A. regulations to keep records of business activities "of the same kind as he has customarily kept" prior to the adoption of such regulations, could be compelled to disclose these records pursuant to a subpoena *duces tecum* even though they might tend to incriminate him of violating the price control law. Shapiro's conviction for violation of the price regulations, based in part upon evidence obtained from his business records, was thus sustained by the Court. In rejecting the argument that its holding would result in the compelled production of self-incriminatory evidence in violation of the Fifth Amendment, the Court pointed out that, while "there are limits which the Government cannot constitutionally exceed in requiring the keeping of records" (335 U.S. at 32), those limits had not there been exceeded. It concluded "that the privilege which exists as to private papers cannot be maintained in relation to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established" (*id.* at 33). Production of the records involved in *Shapiro* could be compelled,

consistent with the Fifth Amendment, because of their relationship to the regulatory power embodied in the Emergency Price Control Act and the pertinent regulations adopted under that legislation. *Shapiro* holds, therefore, that the legitimate exercise of a regulatory power by the government may result in certain documents being regarded as outside the scope of the privilege against self-incrimination.

Nevertheless, we do not regard the "required records" doctrine for which *Shapiro* stands to be of direct relevance in the instant cases. In one of our briefs last Term we stated that, on the facts of that case, there was no need to consider "any possible relationship between the privilege against self-incrimination and the so-called 'required records' doctrine" in the wagering tax context (Govt *Costello* Br. 25, n. 24).³ We believe that position to be the correct one, and do not contend that *Shapiro* has direct application to the situations presented in the instant cases. *Shapiro* deals with the maintaining of records, not

³ In its single opinion in the *Costello* and *Marchetti* cases (reported at 352 F.2d 848), the Second Circuit stated that it was "not required to consider other arguments on which the Government might rely, such as * * * the required records doctrine, see *Shapiro v. United States*, 335 U.S. 1 (1948) * * *" (*Costello* R. 21). Similarly, no mention was made of *Shapiro* in the Third Circuit's opinion in *Grosso* (reported at 358 F.2d 154; see *Grosso* R. 127-128). And, as petitioners point out, the Court in *Albertson* made no reference whatever to *Shapiro* in the course of its opinion (*Grosso* Rearg. Br. 13; *Marchetti* Rearg. Br. 16). See Mansfield, *The Albertson Case: Conflict between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 Sup. Ct. Rev. 103, 114 (hereinafter "Mansfield").

the filing of returns or registration statements. Properly considered, in our view, the "required records" doctrine does not deal with *reports* which are required to be filed with the government and which entail an affirmative declaration of certain specified information, as distinguished from *records* which are required to be kept incident to a tax or regulatory program and which are subject to governmental inspection. Tax returns and registration statements may have certain "public aspects" (335 U.S. at 34), but they must be filed, not maintained, and hardly relate, in any necessary way, to transactions which "could lawfully [be] engage[d] [in] solely by virtue of the license granted * * * under the [pertinent regulatory] statute" (*id.* at 35).⁴ *Shapiro* involved essentially those types of records which are regularly and customarily kept, pursuant to statutes or regulations, in the routine and ordinary course of conducting a certain business.⁵ Such records are not, as a general matter, directly testi-

⁴ In his dissent in *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, Mr. Justice Douglas pointed to the distinction we view as pertinent in this regard. He stated (*id.* at 179-181): "The compiling, the signing, and the filing of the registration statement required of officers, directors, and others by the registration form is a form of elicited testimony, not the surrender of pre-existing records. * * * The cases dealing with the duty to keep records (see *Shapiro v. United States*, *supra*) can be put to one side. * * * Where individuals compile and sign the registration statement, as they must, it is the very making of the registration statement that will incriminate them, not the underlying documents."

⁵ In fact, the pertinent regulation in *Shapiro* called for the maintaining of "records of the same kind as [the regulated business] has customarily kept" (335 U.S. at 5, n. 3).

monial in the way that registration statements and tax returns are, and cannot become incriminatory unless production is demanded and their contents analyzed. Nor are they closely akin to reports whose periodic filing, on government-provided forms, is required, and which, but for that requirement, would not otherwise be prepared. Some such reports, like the registration statement involved in *Albertson* (see 382 U.S. at 77-78), can, by virtue of the information required to be provided, be directly incriminating.

More analogous to the kind of records dealt with in *Shapiro* is the "daily record showing the gross amount of all wagers" required to be kept by one engaged in the business of accepting wagers, pursuant to 26 U.S.C. 4403.⁶ But no such records were ever sought from petitioners in these cases; nor were they charged with failing to keep such records or with refusing to permit inspection of them. Moreover, the validity of the requirement of Section 4403 was never raised or passed upon by any of the courts below. Thus, in the instant cases, there is no issue before the Court as to records of that type.⁷ In an

⁶ In addition to the requirement of Section 4403, 26 U.S.C. 4423 provides for the inspection of "the books of account of any person liable for" the payment of the federal wagering tax, and 26 U.S.C. 6001 requires persons liable for any tax to "keep such records" as may by regulation be prescribed (see *Grosso Rearg. Br.* 12).

⁷ Presumably, it was for similar reasons that the Court made only a passing reference to *Shapiro* in its *Kahriger*

appropriate case the question of the applicability of the "required records" doctrine to the Section 4403 requirement may of course be raised, but that question is not presented here.⁸

In sum, therefore, our answer to the Court's first questions in the reargument orders in these two cases is that the "required records" doctrine of *Shapiro* has no direct bearing upon the registration and return requirements of the wagering tax laws.

II. *Kahriger* and *Lewis* Strike a Proper Balance Between the Privilege and the Power to Tax

That we take this view as to the applicability of the "required records" doctrine does not mean, however, that we regard the underlying rationale of *Shapiro* wholly irrelevant in the instant cases. Although we draw a distinction between reports required to be made and records required to be kept and conclude that the holding in *Shapiro* governs only the latter, that case does stand for the proposition that the Fifth Amendment's privilege against self-incrimination is not an absolute and that some accommodation is proper between the government's need for in-

opinion (345 U.S. at 33, n. 13), and no mention of the "required records" doctrine in *Lewis* (compare *Marchetti* Rearg. Br. 17).

⁸ Both petitioners take the position that *Shapiro* is of no direct relevance in the instant cases (see *Grosso* Rearg. Br. 7; *Marchetti* Rearg. Br. 14). As to the inapplicability of *Shapiro* to reports, as distinguished from records, see generally *Russell v. United States*, 306 F.2d 402, 410-411 (C.A. 9); *United States v. Ansani*, 138 F. Supp. 451, 453-454 (N.D. Ill.); see also *Curcio v. United States*, 354 U.S. 118.

formation and an extension of the privilege to its utmost potential limits.⁹ Indeed, both petitioners concede that the *Shapiro* doctrine sanctions some inroads on the potential scope of the privilege (*Grosso* Rearg. Br. 18-19; *Marchetti* Rearg. Br. 15-18).

Taxation in this country has traditionally been, in essence, a self-assessing and self-reporting system. This self-reporting is generally accomplished through the filing of tax returns. Similarly, registration provisions have long antecedents in the tax field (see *Govt Costello* Br. 9-10). Voluntary compliance accompanied by some degree of disclosure is indeed fundamental to the administration of the Nation's tax system. That concept—a bedrock of our tax structure—has considerable and growing relevance in other regulatory fields as well, and is essential to the government's effective performance of its role in modern society.¹⁰

Reconciliation of the government's need to acquire and use information—in an age of many, large-scale governmental programs whose administration would be impossible without an extensive amount of voluntary compliance and self-reporting—with the constitutional protection against compelled disclosure of incriminating information of a testimonial nature is hardly an easy task. Striking the balance heavily in favor of either the government or the individual

⁹ See Comment, 65 Colum. L. Rev. 681, 682 (1965).

¹⁰ See *Govt Costello* Br. 13, n. 11, for a listing of a few of the businesses and individuals from which disclosures are required under exercises of federal regulatory power.

would be undesirable and would have disruptive and unfortunate consequences. A majority of this Court has consistently chosen the path of accommodation. *Shapiro* is representative of one form of such accommodation. So is the rule of *Murphy v. Waterfront Commission*, 378 U.S. 52, 79, which provides the primary basis for our suggested alternative rationale in the instant cases—that of a use-restriction rule similar to that fashioned by the Court there (see *Govt Costello* Br. 17-25; *Govt Grosso* Br. 18-28). Even more recently, in *Schmerber v. California*, 384 U.S. 757, 762, the Court pointedly stated that “the privilege has never been given the full scope which the values it helps to protect suggest.”

Kahriger and *Lewis*, properly considered, make a like accommodation between the demands of the Fifth Amendment and the needs of the government for information.¹¹ The registration and return require-

¹¹ As stated in the concurring opinion of Mr. Justice Jackson in *Kahriger* (345 U.S. at 34-35): “[W]e deal here with important and contrasting values in our scheme of government, and it is important that neither be allowed to destroy the other. * * * Extension of the immunity doctrines to the federal power to inquire as to income derived from violation of state penal laws would create a large number of immunities from reporting which would vary from state to state. Moreover, the immunity can be claimed without being established, otherwise one would be required to prove guilt to avoid admitting it. Sweeping and indiscriminating application of the immunity doctrines to taxation would almost give the taxpayer an option to refuse to report, as it now gives witnesses a virtual option to refuse to testify. The Fifth Amendment should not be construed to impair the taxing power conferred by the original Constitution, and especially by the Sixteenth Amendment,

ments serve a governmental interest separate and independent from an interest in the underlying activity as such, and seek only the minimal amount of information necessary for the collection of taxes. The holding in *Albertson* thus does not require the overruling of *Kahriger* and *Lewis* (see *Govt Costello* Br. 15-17). Not only did the Court refer in those cases to the prospective nature of the registration requirement;¹² it pointedly stated that, since an individual's entering into the business of gambling is a matter of choice, there is nothing coercive about attaching a condition on his engagement in that business,—that he comply with the federal tax laws (348 U.S. at 422-423).¹³

Reluctance to accept the *Kahriger-Lewis* rationale as a viable accommodation between the privilege and the government's need for information stems in large part, we submit, from the view that the wagering tax is not a "good-faith revenue measure" (345 U.S. at 35, concurring opinion of Mr. Justice Jackson; see also dissenting opinion of Mr. Justice Frankfurter, 345 U.S. at 37, 40). As noted in our *Costello* brief (pp. 11-12, n. 8), because of the Court's limited grant of certiorari we assumed that the validity of the wagering tax as a tax was not at issue in the instant cases. However, the question has been repeatedly al-

further than is absolutely required." See also *James v. United States*, 366 U.S. 213; *Rutkin v. United States*, 343 U.S. 130.

¹² See *Mansfield* 153, 156-158.

¹³ See *Govt Costello* Br. 12-15; *Govt Grosso* Br. 16-18; see also the discussion *infra*, pp. 22-24.

luded to by petitioners," and deserves some comment.

An assumption which seems frequently to be made in this regard is that, if Congress can validly tax gambling, it could also exercise the taxing power against the "kidnapper" or "robber" by the simple expedient of terming such activities a "business". That assumption is not well founded. A business surely does not cease to be such merely because it is illegal. Liquor was a business subject to a federal tax during prohibition;¹⁴ gambling is a business subject to such a tax now. This is how Congress regarded it when it enacted the wagering tax statutes. As we pointed out in our *Costello* brief (p. 9), the principal purpose of the wagering tax—as with other excise taxes enacted at the same time—was to help meet the exigent revenue requirements posed by the Korean War. This purpose is plainly confirmed by the pertinent legislative history (see *Govt Grosso Br.* 11-12). By its very nature, gambling has all the ap-

¹⁴ *E.g.*, *Marchetti* Rearg. Br. 12; *Grosso* Rearg. Br. 18. Petitioner *Marchetti*, while stating at one point that the ten-percent excise tax is roughly equivalent to the amount generally realized as the margin of profit on illegal gambling in this country (*Marchetti* Rearg. Br. 8), somewhat inconsistently notes, several pages later (*id.* at 10, n. 6), that the pertinent Treasury regulations expressly contemplate the passing on of the tax to, and thus, in effect, its collection from, those placing the bets (Treas. Reg. 44.4401-1(2)(iv)).

¹⁵ See *United States v. Constantine*, 296 U.S. 287, 293, where the Court stated: "It would be strange if one carrying on a business the subject of an excise should be able to excuse himself from payment by the plea that in carrying on the business he was violating the law. The rule has always been otherwise."

pearances of an ongoing business. Its continuity of operation and organizational makeup—from an executive hierarchy to a staff of regularly paid employees who keep records and perform other clerical functions (see *United States v. Calamaro*, 354 U.S. 351, 353-354)—give it the earmarks of many other businesses. In recommending adoption of the statutes here involved the congressional committees pointed out: “Commercialized gambling holds the unique position of being a multi-billion-dollar, Nation-wide business that has remained comparatively free from taxation by either State or Federal Governments. The relative immunity from taxation has persisted in spite of the fact that wagering has many characteristics which make it particularly suitable as a subject for taxation.” See H. Rep. No. 586, 82d Cong., 1st Sess., p. 55; S. Rep. No. 781, 82d Cong., 1st Sess., p. 113; see also 97 Cong. Rec. 12231-12243.

It may have been naive for the Congress which passed the wagering tax provisions as a revenue measure to assume that people who violate State law would voluntarily comply with federal law and pay the tax due—then estimated to amount to some \$400 million annually. Perhaps with more funds the measure could be more effectively enforced and produce more revenue.¹⁶ Be that as it

¹⁶ See Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations; 87th Cong., 1st Sess., Pt. I, pp. 95, 98-99, 105 (testimony of Commissioner of Internal Revenue Caplin). Commissioner Caplin estimated that the wagering tax laws, if fully complied with, would bring in almost \$5 billion annually (*id.* at 98).

may, Congress certainly could understandably conclude that the gambling business should be as much subject to taxation as, for example, the selling of jewelry and that excise taxes should be collected from those engaged in that business. Considerable deference should be given to that congressional determination. Not only was the wagering tax enacted as a revenue measure; the fact is that it has produced, and does produce, a significant amount of revenue (over \$100 million since its enactment in 1951),¹⁷ although the yield has been much less than was originally anticipated.

Nor—as this Court has frequently held in situations where the potential for revenue is significantly

¹⁷In a letter filed with the Clerk of this Court subsequent to the argument of the instant cases last Term, the government noted that the total amount of revenue derived from the wagering taxes from 1952 through 1966 was about \$106 million (letter of Solicitor General of January 23, 1967). In that letter it was stated that the estimated cost of enforcing the wagering tax laws during that period, including both Internal Revenue Service costs and Justice Department costs incident to prosecutions, was approximately \$27 million. Petitioner Marchetti apparently challenges that figure, and points out that the I.R.S. costs listed included only those of the Intelligence Division (*Marchetti* Rearg. Br. 12, n. 8). However, we noted in that letter (p. 2) that enforcement of these laws “is primarily handled by the Intelligence Division” of the I.R.S., and pointed out that the estimated figures provided did not include overhead (which would exist without the wagering tax) or “the cost of relatively minor clerical [and] record-keeping tasks performed by other divisions of the Internal Revenue Service” (*ibid.*). We still regard the figures provided to reflect approximately the total cost of enforcing the wagering tax laws during the relevant period.

less ¹⁸—does it militate against the validity of the tax as a tax that total enforcement might discourage persons from going into the gambling business. As this Court said some 100 years ago in the *License Tax Cases* (5 Wall. 462, 473):

There is nothing hostile or contradictory * * * in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of

¹⁸ See, e.g., *McCray v. United States*, 195 U.S. 27 (tax on oleomargarine); *United States v. Doremus*, 249 U.S. 86 (narcotic drugs); *Nigro v. United States*, 276 U.S. 32 (same); *United States v. Sanchez*, 340 U.S. 42 (marihuana); *Sonzinsky v. United States*, 300 U.S. 506 (firearms); *United States v. Stafoff*, 260 U.S. 477 (liquor); *United States v. One Ford Coupe*, 272 U.S. 321 (same). Although these decisions dealt, in terms, with Tenth Amendment and due process claims, they apply as well, in our view, to challenges to federal excise taxes resting on Fifth Amendment grounds—particularly in light of the fact that this Court was obviously aware of the potential Fifth Amendment issue when it decided a number of these cases. See *Govt Grosso* Br. 7-12.

Moreover, at least as to the cases dealing with the excise taxes on businesses made illegal under federal law (e.g., *Stafoff*, *Doremus*, *Nigro*, *Sanchez*, *One Ford Coupe*), no dual sovereignty considerations could be urged as indicating that a Fifth Amendment question was irrelevant, as might be suggested with regard to situations where the States declared illegal the business subjected to the federal taxing power. Cf. *Murphy v. Waterfront Commission*, 378 U.S. 52, 63-77; see *Govt Costello* Br. 15, n. 14; see generally *Govt Grosso* Br. 8-10.

the State to be a justification for the violation of the laws of the Union.

As phrased in the reports of the congressional committees recommending adoption of the wagering tax laws:

* * * [P]roposals for a Federal tax on wagering are sometimes criticized as in effect sanctioning the carrying on of gambling activities in violation of [State] laws. The committee does not share this view. Since its inception, the Federal income tax has applied without distinction to income from illegal as well as legal sources, and it has never been generally supposed that such application carried with it any implied authorization to carry on illegal activities.* * * ¹⁹

Nor does it follow that if the provisions involved in these cases are held valid, Congress, with equal constitutional authority, could adopt legislation imposing a tax on kidnappers and robbers requiring them to register and reveal their criminality under the theory that it was merely taxing "business" activities. In Mr. Justice Holmes' phrase, "Too broadly generalized conceptions are a constant source of fallacy." *Lorenzo v. Wirth*, 170 Mass. 596, 600. As we have indicated, gambling is in fact a large-scale

¹⁹ H. Rep. No. 586, 82d Cong., 1st Sess., p. 55; S. Rep. No. 781, 82d Cong., 1st Sess., p. 113; see also Govt *Grosso* Br. 26-27, discussing petitioner Grosso's contentions regarding 26 U.S.C. 4422, which provides that compliance with the wagering tax laws "shall not exempt any person from any penalty provided" by federal or State law for engaging in the underlying activity whose proceeds are taxed (see the discussion *infra*, p. 32).

and thriving business, even if an illegal one in most States. It is run like a business; it has customers and employees; it is continuing and ongoing in nature, and, more often than not, a joint and collective endeavor. Most gamblers, of necessity, maintain detailed and elaborate books and records. Some of the aspects of gambling, from the earliest times, have been held to be a proper subject of taxation. See the *License Tax Cases*, *supra*.

Kidnapping and robbery, on the other hand, have no such characteristics or history. They are sporadic activities with no clearly defined uniformity or continuity of operation. A robber or "gang" of robbers conveys an entirely different concept than a business-like organization geared to accept wagers. The robber sells no services. His "gang" is usually no more than a loosely knit combination which is dissolved at the completion of the crime, to be reformed in time for the next crime, if at all. Furthermore, crimes like robbery and kidnapping are universally condemned criminal acts which have never been the subject of the taxing power and from whose perpetrators there would not be even a remote chance of collecting substantial amounts of revenue. In such circumstances, to impose a tax would be nothing more than to impose an additional criminal penalty. Cf. *Mansfield* 129-130. Not so with respect to gambling, however, which is neither *malum in se* nor universally prohibited.

If the Court accepts the view that the wagering tax provisions constitute a valid exercise of the constitutional power to tax and should be vindicated even

though an ancillary consequence may be some disclosure of otherwise potentially incriminating information, it should of course reject petitioners' attack upon *Kahriger* and *Lewis*. We have discussed these cases in detail in the *Costello* (pp. 12-17) and *Grosso* (pp. 16-18) briefs filed last Term. At this juncture, we wish only to re-emphasize what we regard as the underlying rationale of those decisions.

We read *Kahriger* and *Lewis*, properly considered, as epitomizing the self-reporting concept here discussed (*supra*, pp. 13-15), and as embodying a realistic accommodation with Fifth Amendment guarantees. Taxation is a normal—one might, perhaps, say inevitable—incident of business activity. The gambling business is not entitled to special status because it is, in most places, an illegal business. One does not have to accept wagers in a professional capacity nor run the risk of the criminal sanctions which might flow from that activity. A potential gambler knows that he is required to comply with a federal tax measure which might enhance the chances that his conduct will come to the attention of prosecuting authorities.²⁰

²⁰ *Kahriger* and *Lewis* hold that if the prospective gambler determines to proceed in the gambling business, he must be regarded as having voluntarily assumed the conditions placed thereon by the federal tax laws—that he must register, file returns and pay the prescribed taxes. This analysis does not lead to the conclusion that the would-be burglar, for example, cannot claim the privilege since he is free to choose whether to commit the burglary or not. Unlike the prospective burglar, the would-be gambler knows, before he engages in gambling, not only that gambling may be unlawful under State or local law—he also knows that it is a business to which Congress has attached certain tax burdens. As to the substantive

If, in view of these known tax requirements, he nevertheless decides to enter the gambling business, it would seem wholly incongruous for him to be immune from the federal excise tax and the related requirements (or, alternatively, that in order to tax the business Congress must make it legal). Compare the *License Tax Cases*, *supra*. In such circumstances, a viable approach, as the Court reasoned in *Kahriger* and *Lewis*, is to treat the decision to enter the business as the equivalent of a non-compelled choice in terms of Fifth Amendment rights. Federal taxation, in other words, is a known condition of engaging in the gambling business, with whatever that might entail for the individual gambler.²¹ So viewed, the decision to gamble is a voluntary one and accordingly lacks the crucial element of compulsion—the basic danger against which the privilege protects.²² As the Court

offense, he stands in the same situation as the would-be burglar; as to the tax obligations, however, he does not—they are conditions attached to his engaging in the business, whether it is lawful or not. This does not mean that any activity is a proper subject for taxation (see the discussion *supra*, pp. 20-21). Nor does it mean that Congress can tax activities because and only insofar as they are unlawful. *United States v. Constantine*, 296 U.S. 287 (see *Govt Costello Br. 12*, n. 10; *Govt Grosso Br. 10*, n. 6).

²¹ Petitioners repeatedly seek to analogize (*e.g.*, *Grosso Rearg. Br. 14-15*) between gamblers required to comply with the wagering tax laws and witnesses called to testify. But, unlike the witness called upon to testify before a grand jury or an investigative body, who cannot generally choose to appear or not, the prospective gambler can choose to gamble or not to gamble (see also the discussion in note 25, *infra*).

²² While it is true that the Court—particularly in *Kahriger*—emphasized the prospective nature of the registration and

said in *Lewis* (348 U.S. at 422-423):

The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They have to give *may* up gambling, but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax.

Despite petitioners' protestations to the contrary (e.g., *Marchetti* Rearg. Br. 13), the predictable sequel to these cases, if *Kahriger* and *Lewis* are overruled, is an attack upon the rationale of *United States v. Sullivan*, 274 U.S. 259. As stated in our *Costello* (pp. 22-23, n. 21) and *Grosso* (p. 11, n. 8) briefs last Term, we regard the income tax situation involved in *Sullivan* as distinguishable from the matters involved here—registration and excise tax requirements relating to those engaged in a business which, in one form or another, is unlawful in all but one of the States, and some of the interstate aspects of which are made criminal under federal law. Income tax returns contain questions "neutral on their face and directed at the public at large [and not] * * * at a highly selective group inherently suspect of criminal activities." *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79. We recognize further that these differences are not insubstantial and that an accommodation of the power to tax income with

occupational tax (see 345 U.S. at 32-33), the broader implication of both rulings was that there is no compulsion within the purview of the Fifth Amendment in the requirement that one comply with the wagering tax laws. See Govt *Grosso* Br. 17-18.

Fifth Amendment guarantees would not be directly impaired by a holding that the provisions involved in the instant cases are constitutionally invalid.

Notwithstanding these differences, however, we point out that there is always some degree of collision between the Fifth Amendment and the exercise of the taxing power, since self-reporting, accompanied by some disclosure, is the traditional foundation of tax administration in this country. The taxing power and the privilege are both in the Constitution. When they collide, some accommodation must be made.²³ Here the contention, in essence, is that Congress cannot validly tax an activity that is unlawful under State law—because it is unlawful. What the gamblers will say in the subsequent case challenging *Sullivan* is that there is simply no effective way to avoid incrimination in reporting income from illegal sources—just as they say now that there is no way to comply with the wagering tax laws without incriminating themselves. Like the taxpayer in *Sullivan*, they seek in the instant cases to draw “a conjurer’s circle around the whole matter” (274 U.S. at 264) by refusing to register and pay the tax at all. Upholding their contention here “would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim” (*Albertson v. Subversive Activities Control Board*, 382 U.S. at 79).²⁴ Yet that

²³ See *Billings v. United States*, 232 U.S. 261, 282; see also *Govt Grosso Br. 10*.

²⁴ See *Mansfield*, 116-120, especially 117.

was a significant point of distinction noted by the Court between *Sullivan* and *Albertson*.

At all events, if the Court rejects the accommodation which *Kahriger* and *Lewis* reflect, we urge that an essentially narrow ground, which will maintain the distinction of the *Sullivan* situation set out in the *Albertson* opinion, be predicated for that result. Otherwise, the Court will undoubtedly be faced, several terms hence, with the claim that, *sub silentio*, it has overruled *Sullivan* and exempted gamblers from income as well as excise taxation. If *Kahriger* and *Lewis* are not followed, adoption of the use-restriction rationale which we have suggested and discussed at some length in our *Costello* (pp. 17-25) and *Grosso* (pp. 18-28) briefs, would avoid the hazard of casting a shadow on the viability of the *Sullivan* rationale.

III. Alternatively, a Use-Restriction Rule Should Be Adopted Instead of Holding the Wagering Tax Provisions Unconstitutional

As suggested immediately above, if the Court should decide that the illegality surrounding gambling makes it inappropriate, in light of *Albertson*, to uphold the *Kahriger-Lewis* rationale, it by no means follows that either the registration or excise tax provisions must fall as an unconstitutional exercise of congressional power. On the contrary, as we urged in some detail in our briefs in *Costello* (pp. 17-25) and *Grosso* (pp. 18-28) last Term, the proper remedy would be to limit the use of the information obtained from registration and the filing of an excise tax return to

federal tax purposes. It seems plain that no incrimination could result if the information disclosed is confined solely to tax uses (see *Govt Costello Br.* 17-19; *Govt Grosso Br.* 19). An individual can hardly be "a witness against himself" if what he is required to disclose cannot be used against him, directly or indirectly, in a subsequent criminal prosecution. A fair accommodation may thus be achieved by barring the use of that information as evidence, as a link in an evidentiary chain or as an investigatory lead, with respect to any criminal prosecution, State or federal, based upon the underlying gambling activity made subject to the wagering tax. This is neither a novel or unworkable doctrine. See *Murphy v. Waterfront Commission*, 378 U.S. 52, 78-79; *United States v. Blue*, 384 U.S. 251, 255; *Adams v. Maryland*, 347 U.S. 179, 181; cf. *Ullmann v. United States*, 350 U.S. 422, 437.

Having already elaborated on these matters in our briefs last Term, we limit our present discussion to a response to the argument that the suggested rationale is an open-ended doctrine and, in practical effect, would be an impermissible judicial conferral of immunity which, if applied here, could logically be applied in any other circumstances to devitalize the basic right to remain silent (see *Marchetti Rearg. Br.* 26-28; *Grosso Rearg. Br.* 19-20.)

We urge no "across-the-board" application of the *Murphy* rationale. There is plainly no occasion or need to so hold in the instant cases. We urge only that where there is a clear governmental interest in the information sought, where only a minimal or

limited disclosure is required, and where the interest in obtaining the information is grounded on a legitimate exercise of a separate and independent governmental power, and not principally a concern with the underlying activity involved, a persuasive case can be made for applying a use-restriction rule like that adopted in *Murphy*. Indeed, a more convincing argument can be made for applying such a rule in the instant circumstances than in the situation presented in *Murphy*. These cases involve the fundamental and essential governmental power to tax. As already observed, inherent in the nature of the taxing power is a self-reporting and disclosure concept which, to some degree at least, collides with the full sweep of the privilege (see *supra*, pp. 13-14). Accordingly, even if the Court rejects the approach of *Kahriger* and *Lewis*, it would seem that, at least as to the taxing power, some accommodation with Fifth Amendment considerations is warranted.²⁵ The Court

²⁵ Contrary to petitioner *Marchetti's* suggestion (Rearg. Br. 18, 26), we suggest no doctrinal distinction between oral testimony and writings insofar as the reach of the privilege is concerned. We recognize that the Court stated in *Albertson* that "if [an] admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes" (382 U.S. at 78). That statement, however, hardly constituted a *sub silentio* overruling of *Shapiro*, as petitioner *Marchetti* intimates (Rearg. Br. 18); otherwise, the Court's treatment of *Shapiro* in *Spevack v. Klein*, 385 U.S. 511, 517-519 (see also Mr. Justice Fortas' concurring opinion, 385 U.S. at 520) is quite inexplicable (see note 33, *infra*), as are the references to *Shapiro* in the reargument orders in the instant cases. All that the gov-

thus need not choose between extremes; it may both preserve the taxing power and at the same time retain the essentials of the privilege—by adopting a use-restriction rule.²⁶ In short, it is the government's view that "by insulating the disclosure from prosecutory use, it may be possible both to preserve the essence of the privilege and at the same time give recognition to the government's interest in obtaining information for certain purposes."²⁷

ernment suggested last Term (see Govt *Grosso* Br. 12-16) is that meaningful differences among various types of governmental inquiries—without regard to whether oral or written responses are sought—should be regarded as relevant in evaluating the substance of privilege claims and in determining what sort of government-individual accommodation, if any, would be appropriate in this regard. An inquiry which focuses upon a particular individual, and subjects him to an in-depth probe of various aspects of his activities—and, at least potentially, to harassment, intimidation and humiliation—obviously may be viewed differently, insofar as the Fifth Amendment is concerned, than a limited inquiry seeking a minimal amount of information necessary for a tax or regulatory purpose and reflecting a governmental interest separate and independent from that in any particular individual's underlying conduct. See generally Mansfield 110-113, 135-138, especially 135.

²⁶ See Mr. Justice White's extensive discussion of this matter in his concurring opinion in *Murphy*, 378 U.S. at 92-107.

²⁷ Mansfield 121. Later in the same piece, it is stated (*id.* at 160, 166): "Sometimes it is well that the privilege bend in order that it not break. The essentials of the privilege are not necessarily sacrificed by requiring disclosure of information when the use to which it is put is controlled and limited. * * * [U]se of incriminating information for purposes other than prosecution will satisfy the reason for compelling disclosure. Advantage should be taken of this fact to reduce the conflict between the privilege and other governmental policies."

Whatever may be the outer limits of the *Murphy* rationale, the instant cases fall well within them. In *Murphy* the State's valid interest in obtaining a witness's testimony clashed with the claim that the witness would potentially be subject to prosecution under federal law. The Court reconciled the competing interests involved as follows (378 U.S. at 79):

We conclude * * * that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.

Similar conflicting interests are involved here. The federal interest in collecting revenue is a vital one, stemming from considerations wholly independent of

Mansfield suggests that an approach in determining when some accommodation between the privilege and the government's need for information is appropriate might be grounded on 1) whether the information requirement exists solely for the purpose of detecting and prosecuting crimes, as an added penalty, or, instead, for some other legitimate governmental purpose, and 2) if the latter, whether that purpose can be achieved even though the information obtained is never used in connection with a criminal prosecution (*id.* at 141). Here the registration and return requirements exist to facilitate the collection of taxes, and that purpose can plainly be achieved although the information disclosed is limited to tax uses only.

the legality or illegality of the activity being taxed. Moreover, it is the fear of incriminating use of the information required to be disclosed in a State prosecution which here creates the basic tension between the taxing power and the privilege.²⁸

Accordingly, as in *Murphy*, there is here an apparent inter-jurisdictional clash of policies. Nor is it a meaningful difference to say that here, unlike in *Murphy*, which involved State compulsion, Congress could have enacted an immunity statute barring State as well as federal prosecution of unlawful gambling activity. By the same token, the Court in *Murphy* could have upheld the claim that the State was without authority to compel the testimony and left it to Congress to fashion an immunity statute of sufficient breadth to protect against federal prosecution. This it did not do.²⁹ Instead—and for the express reason that the State had a vital interest in the exer-

²⁸ Federal legislation, as noted in our *Costello* brief (p. 19, n. 17), prohibits only certain interstate aspects of gambling in specified circumstances. Hence, a person who operates a wagering business within a single State is in no apparent danger of federal prosecution as a result of paying the occupational and excise taxes and filing the required forms. And presumably under the *Sullivan* rationale, as interpreted in *Albertson* (382 U.S. at 79), if the gambling activity is carried on in more than one State, the defendant might refuse to note that fact on the forms that he files.

²⁹ While the Court set aside the judgment of civil contempt and remanded in *Murphy*, it did so because, at the time of the refusal to answer, that refusal was based on the correct view that the answers could be used in a criminal prosecution in the federal courts. The Court simply restored the parties to the status existing before the refusal (see 378 U.S. at 79-80; see also note 39, *infra*).

cise of its investigatory and law-enforcement functions—the Court there adopted a rule sanctioning the compulsion of needed information and prohibiting only its subsequent incriminatory use. The federal interest in securing information for tax collection purposes is patently of no lesser significance.

Moreover, when Congress adopted the wagering tax statutes in 1951, it had no reason to consider the implications of a Fifth Amendment claim in terms of a potential State prosecution. At that time, *Twining v. New Jersey*, 211 U.S. 78, holding the Fifth Amendment inapplicable to the States, stated the governing law (see Govt. *Grosso* Br. 27-28, n. 22). Moreover, there was then little federal legislation proscribing the interstate aspects of gambling. Hence, the fact that no mention was made of this matter in the debates or committee reports leading up to the adoption of the wagering tax laws simply reflects that, in light of the then-prevailing law, there was no sound reason for Congress to concern itself with any possible Fifth Amendment implications. And, while it is true that Congress provided that payment of the wagering taxes “shall not exempt any person from any penalty” under federal or State law for engaging in the activity being taxed (26 U.S.C. 4422), this was simply in recognition of the established principle that Congress does not have to legalize an unlawful business in order to tax it (see cases cited in note 18, *supra*). Inclusion of Section 4422 does not suggest a congressional preference for holding a taxing statute unconstitutional as opposed to application of a judicially framed exclusionary rule (see Govt *Grosso* Br. 26-27).

We stress—as we did in our *Grosso* brief last Term, (pp. 22-26)—that we are not in any way suggesting that the Court usurp the function of Congress and, in effect, adopt an immunity statute, prohibiting completely the prosecution of gamblers under State or federal law. On the contrary, and consistent with the holding in *Murphy*, our alternative argument advocates only the adoption of the rule that those authorities—State or federal—which institute a criminal prosecution of one who has complied with the wagering tax laws, relating to the underlying gambling activity, “have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence” (378 U.S. at 79, n. 18).

Nor do the practicalities of the situation preclude a showing of “an independent, legitimate source” in a subsequent gambling prosecution. As to the excise tax returns, there is little chance that they could be used as a prosecutorial lead, since the information that they require has minimal impeaching worth and the public disclosure provisions of 26 U.S.C. 6107 do not relate to such returns.³⁰ While the statutory disclosure provisions do relate to the registration and special occupational tax provisions, the obvious impact of the rule we alternatively urge will make it quite costly to a prosecutor who might seek to utilize such information. Simply stated, by doing so he will markedly increase his burden of showing an

³⁰ See, however, *Govt Grosso Br. 14*, n. 10, as to the limited availability of such returns, in certain circumstances, to State and local officials.

independent source for his evidence and thereby imperil the success of his prosecution. Indeed, if a prosecutor has a sufficient basis to institute a gambling prosecution wholly apart from what may be learned as a result of the gambler's compliance with the wagering tax laws—which is usually the case where State and local gambling laws are effectively enforced—he would hardly be likely to endanger his case by recourse to any such “tainted” information. Should the Court adopt a use-restriction rule in the instant cases, representatives of the Internal Revenue Service intend to initiate steps seeking congressional amendment of Section 6107 so as to exclude the occupational tax on wagering from the broad class of special taxes presently subject to a degree of mandatory public disclosure under that provision. Pending the enactment of such an amendment, the I.R.S. would, as a matter of policy, caution prosecutorial officials concerning the impact of the use-restriction rule. Similarly, the I.R.S. would, as a practical matter, exercise discretion regarding the disclosure of wagering excise tax return information so as to facilitate conformity with that rule.³¹ Under such an approach, disclosures of information reported on wagering tax forms would be used only to enforce the tax measure and collect revenues due thereunder to the government. This would help ensure that infor-

³¹ We do not mean to suggest that, during the interim period before amendment of Section 6107, the existence of such an administrative policy will in effect satisfy the prosecutor's obligation of showing an “independent source” for his evidence and underlying information. On the other hand, it will not be wholly irrelevant in this regard.

mation disclosed incident to compliance with the wagering tax laws will be used only for tax purposes, and would leave the gambler "in substantially the same position" as if he had not been required to disclose that information (378 U.S. at 79).³² And, apart from these considerations, there is no occasion at this juncture to deal with such essentially evidentiary issues, the resolution of which is indicated by those cases involving application of the "taint" doctrine, e.g., *Wong Sun v. United States*, 371 U.S. 471, 488 (see *Govt Costello Br.* 23-25; *Govt Grosso Br.* 28).

In sum, whatever may be the ultimate implications

³² We recognize that such a use-restriction rule might, in some situations, effectively prevent the prosecution of a person who has complied with the wagering tax laws for certain gambling violations. Where the defendant's identity is obtained through registration or the filing of a return, and an attempt is later made to prosecute him for the underlying activity, the information disclosed may be so crucial and the lead obtained so important that prosecution would be wholly prohibited, not merely the evidentiary use of the information disclosed (cf. the concurring opinion of Mr. Justice Harlan in *Murphy*, 378 U.S. at 91, n. 7). In other words, it is possible to conceive that the effect of such an investigatory lead may not be sufficiently attenuated so that it could be shown that the evidence sought to be introduced was obtained from sufficiently independent sources. That the suggested rule might possibly, in a limited class of situations, result in immunity from prosecution does not convert it into what is essentially an immunity rule. Such a situation would occur only infrequently, if ever, since the identity of those engaged in gambling is generally not a secret to most State and local law-enforcement officials. Application of the rule in this manner might simply be occasionally necessary to ensure that appropriate protection of the privilege is consistently accorded. Compare *Mansfield* 165.

of *Murphy*,³³ the rule there enunciated would seem

³³ There is no merit to petitioner Marchetti's assertion (Rearg. Br. 26-27) that the Court's failure to apply a use-restriction rule last Term in *Spevack v. Klein*, 385 U.S. 511, undermines the reliance on such a suggested approach here. *Spevack* (in overruling *Cohen v. Hurley*, 366 U.S. 117) held only that a lawyer could not be disbarred for claiming the privilege, where to have spoken might also have resulted in such disciplinary action, as well as in possible criminal prosecution. Indeed, there is a suggestion in Mr. Justice Fortas' concurring opinion in *Spevack* (385 U.S. at 519-520) that, if the "required records" doctrine of *Shapiro v. United States*, 335 U.S. 1, had been applicable—which, the Court found, it was not on the facts of that case (see 385 U.S. at 517-518)—he might be compelled to affirm a disbarment order where an attorney refused to keep pertinent records or produce them. Especially significant, in regard to *Spevack*, is the fact that Mr. Justice Fortas, whose vote was needed for a majority, specifically stated that "[i]t is quite a different matter if the State seeks to [use] the testimony given [in disciplinary proceedings] under this lash [of discharge for failure to testify] in a subsequent criminal proceeding," referring to the companion *Garrity* decision (385 U.S. at 519-520) (emphasis added). This suggests a view of *Shapiro* as imposing a use-restriction rule, at least where criminal consequences might flow from a particular disclosure.

Moreover, in *Garrity v. New Jersey*, 385 U.S. 493, a companion case to *Spevack*, where the Court found a violation of the privilege in requiring a policeman to confess his criminal guilt under the threat that if he did not speak he would lose his job, the Court also intimated that it was adopting a use-restriction rule. See Note, 76 Yale L.J. 839, 847, n. 41 (1967); cf. *Spevack v. Klein*, 385 U.S. at 516, n. 3; see also the dissenting opinion of Mr. Justice White, 385 U.S. at 531-532. Indeed, the holding in *Garrity* was that the privilege "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office * * *" (385 U.S. at 500) (emphasis added). Thus, the precise vice found there by the Court was not compulsion—but use—of potentially incriminating information.

plainly applicable to the instant cases, if *Kahriger* and *Lewis* are not followed. There is no need to strike down a taxing statute on Fifth Amendment grounds when a fair accommodation—embodied in a use-restriction rule—is available to sustain the federal authority in this crucial area and at the same time protect against any inroads on basic rights protected by the privilege against self-incrimination.

IV. The Government Does Not Contend That the Obligation to Pay the Special Occupational Tax and the Wagering Excise Tax Can Be Satisfied Without Filing the Required Registration Statement and Tax Return

As our foregoing arguments have emphasized, it is our view that the filing of prescribed reports—whether registration statements to accompany payment of occupational taxes, or returns to accompany payment of excise taxes—is essential to the workability of our self-reporting system of taxation. Moreover, this is so whether the Court reaffirms the rulings in *Kahriger* and *Lewis*, or adopts our alternatively suggested use-restriction rationale. We now turn more directly to the Court's second inquiry, as to the kind of information which, in the government's view, must be filed coincidentally with payment of the special occupational tax and the ten-percent excise tax on wagering. Since there are somewhat different considerations involved with regard to each of these tax obligations, we deal with them separately.

As to the registration statement involved in *Marchetti*, Congress made it plain that every person liable for the fifty-dollar occupational tax, under 26 U.S.C. 4411, "shall register" as provided for under

26 U.S.C. 4412. As we pointed out in our *Grosso* brief last Term (p. 14, n. 10), payment of the special occupational tax and registration are accomplished together through the filing of a single registration form (Form 11-C; contained in Govt *Costello* Br. App.). This form requires information, *inter alia*, as to the name, alias, or trade name (if any), address and location of the business of one who proposes to enter the wagering business and is therefore liable for the special tax. In our view, the minimal information thus requested is essential to a proper effectuation of the taxing power in the circumstances. Just as the payment of the special tax is an "integral part"³⁴ of the plan for collection of the excise tax on wagers, so the registration provisions are directly related to the enforcement and collection of both taxes. It unquestionably facilitates the collection of a tax on a business to have the person therein engaged specify his name, address and place of business and the names and addresses of the persons who carry on the business for him or for whom he carries on the business. This is particularly true of the gambling business, where there would otherwise be no independent information as to the place where the business is being conducted. Such elementary information is, as Congress recognized,³⁵ necessary for the collection of the

³⁴ H. Rep. No. 586, 82d Cong., 1st Sess., p. 60.

³⁵ See, *e.g.*, S. Rep. No. 781, 82d Cong., 1st Sess., p. 118. As noted by petitioners (*Marchetti* Rearg. Br. 20; *Grosso* Rearg. Br. 23), several court decisions (*e.g.*, *United States v. Mungiole*, 233 F. 2d 204 (C.A. 3)) reflect that it is the Commissioner of Internal Revenue's policy not to accept

excise tax (see *Govt Costello Br.* 9-10, 16). Like other numerous registration provisions upheld by this Court, this provision is "obviously supportable as in aid of a revenue purpose." *Sonzinsky v. United States*, 300 U.S. 506, 513. In short, if the occupational tax is a lawful exercise of the taxing power, the registration requirement is a proper and necessary incident of that tax.

Similarly, as to the wagering tax return involved in *Grosso*, it is quite clear that it was the congressional judgment that a completed return form (Form 730, set out in *Govt Grosso Br. App.*) be filed along with payment of the ten-percent excise tax.³⁶ In our *Costello* brief last Term (pp. 22-23, n. 21), we suggested a possible distinction between the *filing* of a registration statement and a wagering tax return, and the *payment* of the wagering excise tax, noting that payment of that tax might be effectuated "through means not necessarily having an incrimina-

payment of the occupational tax unless the taxpayer furnishes the information required on the registration form, and hold that a tendered but rejected payment is no defense to a subsequent non-payment prosecution. A similar policy obtains regarding payment of the ten-percent excise tax, *i.e.*, the prescribed form must accompany payment or the money is not accepted. In short, in the language of *Albertson* (382 U.S. at 78), "nothing in the Act or regulations permit less than literal and full compliance with the requirements" for filing the prescribed forms.

³⁶ Under 26 U.S.C. 6011 Congress has required that a return "shall" be filed, when so provided for by regulation. Under *Treas. Reg.* 44.6011(a)-1(a), a monthly tax return is required to be filed by those who must pay the wagering excise tax under 26 U.S.C. 4401.

tory potential.”³⁷ On further reflection, however, we have concluded that an excise tax return must be filed along with and accompany payment of the tax. It is the considered judgment of the responsible administrative officials—and presumably Congress as well—that this is the only rational way in which such an excise tax can be effectively administered in an orderly fashion. At the very least, the name and address of the person paying the tax is essential to serve this end. If such information is required, there is no sound reason why the taxpayer should not also be required, in the monthly return, to list the gross amounts of wagering receipts upon which the tax is figured. In short, our answer to the Court’s second questions in the reargument orders is that neither the obligation to pay the special occupational tax nor the wagering excise tax can be satisfied, in the govern-

³⁷ We did note, in our *Grosso* brief last Term (p. 19, n. 14), that the appropriate return, or “at least some identification of the taxpayer,” must be provided along with payment to permit effective tax administration. Form 730 is the return form currently prescribed for completion along with the required monthly payment of the wagering excise tax, and relates to that tax alone. There is no reason why, as an administrative matter, a general excise tax return form (such as Form 720, although that form is for a number of excise taxes required to be paid quarterly) might not be prescribed for the wagering excise tax, if the use of such a less specific and more neutral form would be regarded as having a significantly less incriminatory potential. Nevertheless, the return form presently prescribed and in use is Form 730, and it is our position that, under current regulations and practice, that form, properly filled out, must accompany payment of the ten-percent wagering excise tax.

ment's view, without the filing of the prescribed registration and return forms.³⁸

CONCLUSION

For the reasons stated herein and in our briefs of last Term, the judgments of the courts of appeal should be affirmed in both the *Marchetti* and *Grosso* cases.³⁹

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SEPTEMBER 1967.

³⁸ Since we take the view that a return form must accompany payment of the wagering excise tax, there is no occasion to consider the second part of the Court's second question in its reargument order in *Grosso* (see *supra*, p. 4).

³⁹ For a discussion of the reasons why, in our view, the convictions here should be affirmed even if the Court declines to adhere to *Kahriger* and *Lewis* and instead adopts our suggested use-restriction approach, we refer the Court to our briefs of last Term in *Costello* (pp. 25-26) and *Grosso* (pp. 28-29).

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 2

JAMES MARCHETTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Nature of the Proceeding

The Government, as its brief on reargument makes clear, is essentially in accord with petitioner on the two additional, specific questions propounded by the Court last Term. First, the Government disclaims any direct reliance on the required records doctrine announced in *Shapiro v. United States*, 335 U. S. 1 (1948) (Govt. Rearg. Br. 8).¹ Second,

¹ References are indicated as follows:

References to the numbered pages of the Government's brief on reargument, this Term (Govt. Rearg. Br. _____).

References to the numbered pages of the Government's brief in *Costello v. United States*, No. 3, this Term (Govt. Br. _____).

References to the numbered pages of petitioner's brief, last Term (Pet. Br. _____).

References to the numbered pages of petitioner's supplemental brief, this Term (Pet. Supp. Br. _____).

the Government recognizes that all information required by 26 U. S. C. §4412 and Form 11-C must be furnished in order to satisfy the obligation to pay the special occupational tax required by 26 U. S. C. §4411 (Govt. Rearg. Br. 38).

While admitting that *Shapiro* has no direct application here, the Government suggests that *Shapiro*'s underlying rationale indirectly bolsters the *Kahriger-Lewis* doctrine (Govt. Rearg. Br. 12), which the Court desires to review. And while admitting that registration and filing of the return must accompany payment of the special occupational tax, the Government repeatedly characterizes the information called for as "minimal" (Govt. Rearg. Br. 6, 7, 15, 27, 28, 29, 38) so as to justify the encroachment on the privilege involved here.

With the area of disagreement between the parties now more closely defined, petitioner, by way of reply, analyzes the Government's most recently articulated position to demonstrate that neither *Shapiro*, as the Government now applies it, nor the claimed "minimal" amount of information sought by the wagering tax laws can breathe continued vitality into the *Kahriger-Lewis* doctrine or justify the alternative, use-restriction rule which the Government requests.

I.

The Underlying Rationale of *Shapiro* Does Not Warrant Retention of the *Kahriger* and *Lewis* Cases.

The Government recognizes that the required records doctrine does not deal with reports which must be filed, as distinguished from records which must be kept and which are subject to Government inspection (Govt. Rearg. Br. 10). Noting that the pertinent regulation in *Shapiro* required the keeping of "records of the same kind as [the regulated business] has customarily kept" (Govt. Rearg. Br. 10, n. 5), the Government concludes that the doctrine has no direct bearing on the validity of the wagering tax laws. In this respect the parties are in accord.

But the Government and petitioner part company as the Government expands its previous *Shapiro* position to argue that *Shapiro* justifies reading *Kahriger* and *Lewis* as making a proper accommodation between the Fifth Amendment privilege and the need for information in the context of this case (Govt. Rearg. Br. 14).² The Government ignores this Court's recent pronouncement that the Fifth Amend-

² Last Term, the Government stated simply that there "was no need for the Court to consider 'any possible relationship between the privilege . . . and the so-called 'required records' doctrine . . .'" (Govt. Br. 25, n. 24). Petitioner reasoned that this position of the Government was correct and that it followed logically from the implied rejection of *Shapiro* by the Court in *Kahriger*. In *Kahriger*, the Government argued extensively that *Shapiro* controlled (Reply Brief for United States 24-27). Although the Court made a "passing reference to *Shapiro*" (Govt. Rearg. Br. 11; n. 7) in *Kahriger*, it did not accept the Government's reliance on *Shapiro*. Certainly, nothing in more recent decisions justifies utilizing *Shapiro* to bolster *Kahriger* now.

ment permits "no balancing by the courts of the competing private and public interests" and affords "a witness the right to resist inquiry in all circumstances : . ." even if the Government is seeking his testimony in the name of "self-preservation, 'the ultimate value of any society.'" *Barenblatt v. United States*, 360 U. S. 109, 126, 128 (1959). Rather, the Government argues that the privilege against self-incrimination must be accommodated to justify the "minimal" amount of information required by the wagering tax laws (Govt. Rearg. Br. 45). The Government arrives at this position by a series of related claims, which petitioner reviews here:

A. *As to the Government's claim that the wagering tax laws are justified "since they serve a governmental interest separate and independent from an interest in the underlying activity."* (Govt. Rearg. Br. 15.) The independent governmental interest upon which the Government relies is, of course, its stated interest in raising revenue. But the Government makes no mention of how the mandatory public disclosure of wagering tax registrants, 26 U. S. C. §6107, is germane to its revenue raising interest:

" . . . the statutory provision which throws records open to state prosecutors goes far beyond any federal interest in enforcing payment of the tax. Its only function is to compel gamblers to reveal their illegal activities; it adds nothing to the enforcement of the tax or to any other federal regulatory purpose." Comment, *Self-Incrimination and the Federal Excise Tax on Wagering*, 76 YALE L. J. 839, 846-847 (1967).

Moreover, the Government's valid-purpose claim mistakenly emphasizes one of the declared purposes of the

legislation, but ignores "that where legislative abridgment of 'fundamental personal rights and liberties' is asserted, 'the courts should be astute to examine the effect of the challenged legislation . . .'" *Shelton v. Tucker*, 364 U. S. 479, 489 (1960). (Emphasis added.)

In a host of situations a valid regulatory purpose has not saved legislation which results in incriminatory disclosures. Thus, the valid purpose of the Subversive Activities Control Act to prevent the world-wide Communist conspiracy from accomplishing its purpose in this country, *Communist Party v. Subversive Activities Control Board*, 367 U. S. 1, 94-96 (1961), did not justify the registration provisions struck down in *Albertson v. Subversive Activities Control Board*, 382 U. S. 70* (1965); the valid purpose of the National Firearms Act to raise revenue for the federal treasury, *Sonzinsky v. United States*, 300 U. S. 506 (1937), did not justify the registration which brings the illegal act of possession of firearms to the attention of the authorities, *Russell v. United States*, 306 F. 2d 402 (9 Cir. 1962); and the valid purpose of the Johnson Act to regulate interstate sales of gambling devices, *United States v. Five Gambling Devices*, 346 U. S. 441, 450 (1953), did not justify requirements for reporting sales of illegal gambling devices, *United States v. Ansani*, 138 F. Supp. 451 (N. D. Ill. 1955), *aff'd* 240 F. 2d 216 (7 Cir.), *cert. denied*, 353 U. S. 936 (1957).

Certainly, if petitioner were summoned before a tribunal gathering data for legislation and were asked the same questions contained on Form 11-C, none would gainsay his right to invoke the privilege even though the purpose of the inquiry was not to detect criminality on petitioner's

part and even though the valid purpose of the probe might be defeated by lack of evidence without petitioner's response.

One recent comment rejects the Government's thesis that a proper revenue purpose salvages the wagering tax laws:

"The essential principle is simple: a statutory scheme which requires an individual to reveal actual or intended criminal activity is unconstitutional unless absolute immunity is given. This principle both defines and limits the application of the self-incrimination privilege toward compelled disclosures, at least in extreme cases like the wagering tax." Comment, 76 YALE L.J., *supra* at 845.

B. *As to the Government's claim that the payment of the tax and registration are non-compulsory* (Govt. Rearg. Br. 22-24). The Government seeks to avoid the impact of comparing the questions asked of the wagering tax taxpayer with similar questions asked of witnesses before any proper tribunal by arguing that the prospective taxpayer, unlike the prospective witness, can avoid incrimination by not gambling (Govt. Rearg. Br. 23, n. 21). Here again, the Government avoids the impact of *Albertson*.

If the Government's reasoning is sound, the *Albertson* registration provision would have been held valid since individual Communist Party members could have avoided registering or facing penalties for non-registration by terminating their membership in the Party. In *Albertson*, the Government recognized that termination of an individual's Party membership eliminated the need of that individual to register for the Party. 382 U. S. at 73, n. 3. It follows, then, that under *Albertson*, the responses called

for here are compulsory within the meaning of the Fifth Amendment, and what the Court said there is equally applicable here:

" . . . if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes." 382 U. S. at 78.

The Government's claim that there is no compulsion involved in the wagering tax registration requirement is based on the assertion that a potential gambler has notice that he is "required to comply with the federal tax measure." (Govt. Rearg. Br. 22.) As Professor Maguire pointed out:

"This is surely fallacious. Proper notification may stave off a holding of failure in procedural due process; it cannot supply fundamental authority to command anything and everything." Maguire, *EVIDENCE OF GUILT* §2.09 (1959).

C. *As to the Government's fear that reversal of Kahriger and Lewis will constitute a threat to the collection of income taxes* (Govt. Rearg. Br. 25). The parties are in accord that the income tax situation involved in *United States v. Sullivan*, 274 U. S. 259 (1927)—where the questions "were neutral on their face," *Albertson v. Subversive Activities Control Board*, *supra*, 382 U. S. at 79—is distinguishable from the matters involved here (Govt. Rearg. Br. 24).

Recognizing that the difference in the income and wagering taxes "are not insubstantial and that an accommodation of the power to tax income with Fifth Amendment guar-

antees would not be directly impaired by a holding that the provisions involved in the instant cases are constitutionally invalid" (Govt. Rearg. Br. 24-25), the Government nevertheless asks the Court to retain *Kahriger* and *Lewis* so as not to jeopardize collection of income taxes from gamblers (Govt. Rearg. Br. 25).³

In this connection the Government emphasizes the need for self-reporting and voluntary compliance by taxpayers to our system of revenues (Govt. Rearg. Br. 13, 22, 25). In large measure, it is true, the United States has a system of taxation by confession. But it is the existence of the wagering tax laws—which the Government now seeks to sustain—not the recognition of the unconstitutionality of these laws—as petitioner urges—which presents the potential harm to the system of taxation by voluntary confession. For, as Mr. Justice Jackson recognized in his *Kahriger* concurrence, "It will be a sad day for the revenues if the good will of the people toward their taxing system is frittered away in efforts to accomplish by taxation moral reforms that cannot be accomplished by direct legislation." 345 U. S. at 36.

To bolster its fear of potential harm to the income tax collections, the Government inaccurately summarizes petitioner's position as, "Here the contention, in essence, is

³ It is ironic that today the Government urges a fear of ~~protected~~ ^{projected} harm to the income tax revenue as a basis to sustain the validity of the wagering tax. At the time of the enactment of the legislation here challenged, the Government opposed the legislation on the very ground, *inter alia*, that it might cause gambling operators to "evade income taxes as well as the wagering taxes." *Hearings Before the Permanent Subcommittee on Investigation of the Committee on Government Operations*, U. S. Sen., 87th Cong., 1st Sess., Part I, 95 (1961).

that Congress cannot validly tax an activity that is unlawful under State law—because it is unlawful.” (Govt. Rearg. Br. 25.) But this is not petitioner’s position (Pet. Supp. Br. 13): On the contrary, the principles which petitioner urges here do “not bar the federal government from taxing gambling as a revenue measure. . . . What the government cannot do is compel information under one statute which necessarily admits the violation of an unrelated criminal statute: this is the essence of self-incrimination.” Comment, 76 YALE L. J., *supra* at 847.⁴

Petitioner does not quarrel with the Government’s request that, if the Court overturn *Kahriger* and *Lewis*, it do so in a fashion that will not *sub silentio* exempt gamblers

⁴ Contrary to the Government’s assertion (Govt. Rearg. Br. 15), petitioner’s position is consistent with the Court’s limited grant of certiorari in this case. Petitioner maintains that because the wagering tax laws admit of no non-incriminating compliance they violate the constitutional privilege against self-incrimination. Petitioner’s cause here is not founded on the principle that Congress cannot tax gambling activity, since petitioner’s Tenth Amendment question was not accepted for review. As this Court has made clear, it “will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects.” *Aptheker v. Sec’y of State*, 378 U. S. 500, 515 (1964).

Petitioner detailed the operation of the wagering tax laws to demonstrate that they operate upon “a highly selective group inherently suspect of criminal activities . . .” and against “an area permeated with criminal statutes . . .” *Albertson v. Subversive Activities Control Board*, *supra*, 328 U. S. at 79, not to discuss Congress’ power *per se* to tax illegal activity (Pet. Supp. Br. 6-14).

Furthermore, contrary to the Government’s assertion (Govt. Rearg. Br. 16, n. 14), petitioner does not state that the Treasury regulations contemplate passing the tax on to the person placing the bet. Rather, as petitioner noted (Pet. Supp. Br. 10, n. 6), only where the underlying activity is legal, i.e. Nevada, can the 10 per cent excise tax, as a practical matter, be passed on to the person placing the bets. This is still further evidence that the taxes operate upon an area permeated with criminal statutes.

from income taxation (Govt. Rearg. Br. 26). Nor does this pose a difficult task. It merely entails prohibiting incriminating disclosures from a "highly selective group inherently suspect of criminal activities," *Albertson v. Subversive Activities Control Board, supra*, 382 U. S. at 79. As in *Albertson*, where the "risks of self-incrimination which the petitioner takes in registering are obvious," 382 U. S. at 77, there is here no need to fear the effect of the "conjurer's circle," which Mr. Justice Holmes condemned in *United States v. Sullivan, supra*, 274 U. S. at 264. While the Court could reasonably fear use of a mystical circle as claimed justification for non-disclosure of all essentially neutral inquiries on an income tax form, any fear of such a device is unrealistic when the inquiries are directed to an area, as here, "permeated with criminal statutes," 328 U. S. at 79, and where any disclosure is incriminating. The demise of *Kahriger* and *Lewis*, then, need have no effect on the collection of the income tax.

To sustain *Kahriger* and *Lewis*, on the other hand, does nothing to enhance the self-confession aspects of tax administration so vital in the income tax context in this country (Govt. Rearg. Br. 25). Moreover, it sanctions use of a tax measure which necessarily requires self-confession to crime. This is hardly a "realistic accommodation with Fifth Amendment guarantees" as the Government claims (Govt. Rearg. 22).⁵

⁵ The Government suggests that if the present legislation is upheld, Congress would be unable to impose a similar tax scheme upon "kidnappers and robbers," because they are less organized than gamblers (Govt. Rearg. Br. 20). The Government makes no mention of the organization of such businesses as prostitution, receiving stolen goods or peddling stolen cars. This discussion, moreover, is besides the mark because, as noted, the question here does not involve the Congressional power to tax, but the type of disclosures required and the nature of the underlying activity involved. When

II.

The Classification Of The Information Compelled By The Wagering Tax Laws As "Minimal" Does Not Warrant Retention Of The *Kahriger* and *Lewis* Cases.

The Government recognizes that registration under 26 U. S. C. §4412 must accompany payment of the special occupational tax under §4411. In this respect the parties are in accord. But when the Government urges repeatedly that the required information is "minimal" and seeks to use this label as justification for the incriminatory tax scheme here involved (Govt. Rearg. Br. 6, 7, 15, 27, 28, 29, 38), the parties are at issue.

It is difficult to justify the "minimal" classification. Form 11-C, which the Government concedes must be completed, calls for the taxpayer's name, alias, residence address, business address, names and addresses of all employees, agents and principals and a statement as to whether the taxpayer is in the business of accepting wagers.

Moreover, 26 C. F. R. §44.4412-1 (b) (2) requires a person subject to the wagering tax who engages an employee to submit that employee's name within 10 days after the employee is engaged. Related statutes require the keeping of a "daily record showing the gross amount of all wagers . . . , " which with other records "may be examined and inspected as frequently as may be needful to the enforcement of this chapter." 26 U. S. C. §§4403, 4423.

the registration requires disclosures relating to an activity which, as the Government recognizes, "is unlawful in all but one of the States, and some of the interstate aspects of which are made criminal under federal law" (Govt. Rearg. Br. 24), the scheme necessarily runs afoul of the privilege, without regard to the degree of organization of the activity which is taxed.

Far from having "minimal" effect upon the wagering tax taxpayer, the disclosure in response to the statutory scheme here involved, if not an outright admission of violations of anti-wagering or conspiracy laws, would constitute at the very least "a link in a chain of evidence" sufficient to connect the taxpayer with such violations. *Hoffman v. United States*, 341 U. S. 479, 486 (1961). Compliance with the wagering tax laws "cannot possibly have . . . [anything but a] . . . tendency to incriminate." *Malloy v. Hogan*, 378 U. S. 1, 12 (1964).

III.

Adoption Of The Government's Suggested Use-Restriction Rule Would Constitute An Unwarranted Dilution Of The Privilege Against Self-Incrimination.

Although recognizing a basic right to remain silent afforded by the Fifth Amendment (Govt. Rearg. Br. 27), the Government alternatively urges adoption of a use-restriction rule, based upon *Murphy v. Waterfront Commission*, 378 U. S. 52, 78-79 (1964), which would eliminate that right to silence as the proper scope of protection for the privilege in the context of the wagering tax laws.

As pointed out last Term, in no case before or after *Murphy* has the Court—in a situation where at the time of judicial review the silence has not yet been broken—adopted a use-restriction rule (Pet. Br. 12-13). In *United States v. Blue*, 384 U. S. 251 (1966) and *Garrity v. New Jersey*, 385 U. S. 493 (1967), as well as in *Miranda v. Arizona*, 384 U. S. 436 (1966), the traditional right to silence could not be observed because when review occurred the silence had already been broken. As the Government recognized,

the Court could, "as a practical matter, focus only upon the point of attempted use" (Govt. Br. 20).

On the other hand, where, as here, silence has not been violated when review of the privilege issue occurs, the right to silence has generally been maintained by this Court. Thus, in *Malloy, Albertson and Spevack v. Klein*, 385 U. S. 511 (1967), the right to silence based on the Fifth Amendment privilege was upheld. In none of these cases did the Court order disclosure by the proponent of the privilege with a correlative restriction on the use of the disclosed information.⁶

Murphy, the lone exception, was fashioned to avoid the choice of repealing all state immunity statutes, on the one hand, Sobel, *The Privilege Against Self-Incrimination 'Federalized'*, 31 BROOKLYN L. REV. 1, 46 (1964), or permitting the states to grant "immunity baths" from federal prosecution on the other hand. Note, *Counselman, Malloy, Murphy, and the State's Power to Grant Immunity*, 20 RUTGERS L. REV. 336, 345-346 (1966). This case presents no such choice.

The Government recognizes the conflict between its use-restriction rule and the Congressional policy for mandatory public disclosure of wagering tax information pur-

⁶ The Government suggests petitioner's use of *Spevack* is misplaced because of Mr. Justice Fortas' suggestion in his concurrence that "if the 'required records' doctrine . . . had been applicable . . . he might be compelled to affirm a disbarment order where an attorney refused to keep pertinent records or produce them . . ." (Govt. Rearg. Br. 36, n. 33). But, if the required records doctrine had applied, then the underlying records would not have been privileged. Mr. Justice Fortas did not quarrel with the remand order in *Spevack*; he did not state that on remand *Spevack* should be compelled to produce the records, but be protected from the use of the records against him. Instead he stated, "I join in the order of the Court," 385 U. S. at 520.

suant to 26 U. S. C. §6107. It offers to ask Congress to amend §6107 to be consistent with its requested rule (Govt. Rearg. Br. 34). But at present, then, as in *Albertson*, "the Government's argument would do violence to the congressional scheme." 382 U. S. at 77. "Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of the statute." *Scales v. United States*, 367 U. S. 203, 211 (1961).

Even if the Court expands *Murphy* as the Government requests, petitioner's convictions should, contrary to the Government's position (Govt. Rearg. Br. 41, n. 39), be set aside. What the Government asks in its alternative argument is that *Irvine v. California*, 347 U. S. 128 (1954)—which sanctioned the use of wagering tax information in criminal prosecutions—be overruled. At the time he was required to pay the tax and register, then, petitioner, like the witness in *Murphy*, had every reason under *Irvine* to fear incrimination by compliance. Neither petitioner nor the witness in *Murphy* could reasonably anticipate a new doctrine insulating compelled responses from further use. It follows, then, that even if the *Murphy* exclusionary rule is adopted, petitioner's convictions, like the judgment of contempt against the witnesses in *Murphy*, cannot stand.

There is here

~~Here is fear~~ no "inter-jurisdictional clash of policies" sufficient to justify a *Murphy*-type exclusionary rule, as the Government claims (Govt. Rearg. Br. 31). *Murphy* is, as noted, predicated on the need to save all state immunity statutes *not* on "the fear of incriminating use of the information required to be disclosed in a State prosecution," as the Government states. In *Malloy*, which was decided the same day as *Murphy*, it was the use of the information in a state prosecution which was feared. Yet, in *Malloy* the right to silence was upheld, thus demonstrating the limited scope of the use-restriction rule in *Murphy*.

Conclusion

For these reasons, then, and for the reasons advanced in petitioner's earlier briefs, the judgments of the court below should be—and petitioner requests that they be—reversed with directions to enter judgments of acquittal.

Respectfully submitted,

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October 6, 1967

SUPREME COURT OF THE UNITED STATES

No. 2.—OCTOBER TERM, 1967.

James Marchetti, Petitioner,
v.
United States.

On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[January 29, 1968.]

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner was convicted in the United States District Court for the District of Connecticut under two indictments which charged violations of the federal wagering tax statutes. The first indictment averred that petitioner and others conspired to evade payment of the annual occupational tax imposed by 26 U. S. C. § 4411. The second indictment included two counts; the first alleged a willful failure to pay the occupational tax, and the second a willful failure to register, as required by 26 U. S. C. § 4412, before engaging in the business of accepting wagers.

After verdict, petitioner unsuccessfully sought to arrest judgment, in part on the basis that the statutory obligations to register and to pay the occupational tax violated his Fifth Amendment privilege against self-incrimination. The Court of Appeals for the Second Circuit affirmed, 352 F. 2d 848, on the authority of *United States v. Kahriger*, 345 U. S. 22, and *Lewis v. United States*, 348 U. S. 419.

We granted certiorari to re-examine the constitutionality under the Fifth Amendment of the pertinent provisions of the wagering tax statutes, and more particularly to consider whether *Kahriger* and *Lewis* still have vital-

ity.¹ 383 U. S. 942. For reasons which follow, we have concluded that these provisions may not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination. The judgment below is accordingly reversed.

I.

The provisions in issue here are part of an interrelated statutory system for taxing wagers. The system is broadly as follows. Section 4401 of Title 26 imposes upon those engaged in the business of accepting wagers an excise tax of 10% on the gross amount of all wagers they accept, including the value of chances purchased in lotteries conducted for profit. Parimutual wagering enterprises, coin-operated devices, and state-conducted

¹ Certiorari was originally granted in *Costello v. United States*, 383 U. S. 942, to consider these issues. Upon Costello's death, certiorari was granted in the present case. 385 U. S. 1000. Marchetti and Costello, with others, were convicted at the same trial of identical offenses, arising from the same series of transactions. Certiorari both here and in *Costello* was limited to the following question: "Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this Court, especially in view of its recent decision in *Albertson v. Subversive Activities Control Board*, 382 U. S. 70 (1965), overrule *United States v. Kahriger*, 345 U. S. 22 (1953), and *Lewis v. United States*, 348 U. S. 419 (1955)?" After argument, the case was restored to the calendar, and set for reargument at the 1967 Term. 388 U. S. 903. Counsel were asked to argue, in addition to the original question, the following: "(1) What relevance, if any, has the required records doctrine, *Shapiro v. United States*, 335 U. S. 1, to the validity under the Fifth Amendment of the registration and special occupational tax requirements of 26 U. S. C. §§ 4411, 4412? (2) Can an obligation to pay the special occupational tax required by 26 U. S. C. § 4411 be satisfied without filing the registration statement provided for by 26 U. S. C. § 4412?"

sweepstakes are expressly excluded from taxation. 26 U. S. C. § 4402. Section 4411 imposes in addition an occupational tax of \$50 annually, both upon those subject to taxation under § 4401 and upon those who receive wagers on their behalf.

The taxes are supplemented by ancillary provisions calculated to assure their collection. In particular, § 4412 requires those liable for the occupational tax to register each year with the director of their local internal revenue district. The registrants must submit Internal Revenue Service Form 11-C,² and upon it must provide their residence and business addresses, must indicate whether they are engaged in the business of accepting wagers, and must list the names and addresses of their agents and employees. The statutory obligations to register and to pay the occupational tax are essentially inseparable elements of a single registration procedure;³ Form 11-C thus constitutes both the application for registration and the return for the occupational tax.⁴

² A July 1963 revision of Form 11-C modified the form of certain of its questions. The record does not indicate which version of the return was available to petitioner at the time of the omissions for which he was convicted. The minor verbal variations between the two do not affect the result which we reach today.

³ The Treasury Regulations provide that a stamp, evidencing payment of the occupational tax, may not be issued unless the taxpayer both submits Form 11-C and tenders the full amount of the tax. § 44.4901-1 (c). Accordingly, the Revenue Service has refused to accept the \$50 tax unless it is accompanied by the completed registration form; and it has consistently been upheld in that practice. See *United States v. Whiting*, 311 F. 2d 191; *United States v. Mungiole*, 233 F. 2d 204; *Combs v. Snyder*, 101 F. Supp. 531, aff'd, 342 U. S. 939. The United States has in this case acknowledged that the registration and occupational tax provisions are not realistically severable. Brief on Reargument 37-41.

⁴ In his trial testimony in *Grosso v. United States*, decided herewith, *post*, p. —, W. Dean Struble, technical advisor to the District Director of Internal Revenue, Pittsburgh, Pennsylvania, de-

In addition, registrants are obliged to post the revenue stamps which denote payment of the occupational tax "conspicuously" in their principal places of business, or, if they lack such places, to keep the stamps on their persons, and to exhibit them upon demand to any Treasury officer. 26 U. S. C. § 6806 (c). They are required to preserve daily records indicating the gross amount of the wagers as to which they are liable for taxation, and to permit inspection of their books of account. 26 U. S. C. §§ 4403, 4423. Moreover, each principal internal revenue office is instructed to maintain for public inspection a listing of all who have paid the occupational tax, and to provide certified copies of the listing upon request to any state or local prosecuting officer. 26 U. S. C. § 6107. Finally, payment of the wagering taxes is declared not to "exempt any person from any penalty provided by a law of the United States or of any State for engaging" in any taxable activity. 26 U. S. C. § 4422.

II.

The issue before us is *not* whether the United States may tax activities which a State or Congress has declared unlawful. The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation, and nothing that follows is intended to limit or diminish the vitality of those cases. See, *e. g.*, *License Tax Cases*, 5 Wall. 462. The issue is instead whether the methods employed by Congress in the federal wagering tax statutes are, in this situation, consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment. We

scribed Form 11-C as follows: "A Form 11-C serves two purposes. The first is an application for registry for a wagering tax stamp. After the application is properly filed and the tax paid, at that time the Form 11-C becomes a special tax return." Transcript of Record 90.

must for this purpose first examine the implications of these statutory provisions.

Wagering and its ancillary activities are very widely prohibited under both federal and state law. Federal statutes impose criminal penalties upon the interstate transmission of wagering information, 18 U. S. C. § 1084; upon interstate and foreign travel or transportation in aid of racketeering enterprises, defined to include gambling, 18 U. S. C. § 1952; upon lotteries conducted through use of the mails or broadcasting, 18 U. S. C. §§ 1301-1304; and upon the interstate transportation of wagering paraphernalia, 18 U. S. C. § 1953.

State and local enactments are more comprehensive. The laws of every State, except Nevada, include broad prohibitions against gambling, wagering, and associated activities.⁵ Every State forbids, with essentially minor

⁵ The following illustrate the state gambling and wagering statutes under which one engaged in activities taxable under the federal provisions at issue here might incur criminal penalties. Ala. Code, Tit. 14, c. 46 (1958); Alaska Laws, Tit. 65, c. 13 (1949); Ariz. Rev. Stat. § 13-438 (1956); Ark. Stat., Tit. 41, c. 20 (1947); Cal. Pen. Code, §§ 330-337a (1956); Colo. Rev. Stat., c. 40, Art. 10 (1963); Del. Code Ann. §§ 11:665-11:669 (1953); D. C. Code Ann. §§ 22-1504-22-1511 (1967); Fla. Stat. Ann. § 849 (1963); Ga. Code Ann., c. 26-24 (1953); Hawaii Rev. Laws, c. 288 (1955); Idaho Code Ann., Tit. 18, c. 38 (1948); Ill. Rev. Stat., c. 38, Art. 28 (1965); Ind. Stat. Ann., Tit. 10, c. 23 (1956); Iowa Code Ann., c. 726 (1950); Kan. Gen. Stat. Ann., c. 21, Art. 15 (1964); Ky. Rev. Stat. § 436.200 (1963); La. Stat. Ann. § 14:90 (1951); Me. Rev. Stat. Ann., Tit. 17, c. 61 (1964); Md. Ann. Code, Art. 27, §§ 237-242 (1967); Mass. Ann. Laws, c. 271 (1956); Mich. Stat. Ann. § 28-533 (1962); Minn. Stat. Ann. § 609.755 (1964); Miss. Code Ann. §§ 2190-2202 (1942); Mo. Rev. Stat. Ann. § 563.350 (1959); Mont. Rev. Codes Ann., Tit. 94, c. 24 (1947); Neb. Rev. Stat. § 28-941 (1943); Nev. Rev. Stat. §§ 293.603, 465.010 (1957); N. H. Rev. Stat. Ann., c. 577 (1964); N. J. Stat. Ann., Tit. 2A, c. 112 (1953); N. M. Stat. Ann., c. 40A, Art. 19 (1953); N. Y. Pen. Law, Art. 225 (1967); N. C. Gen. Stat. §§ 14-292-14-295 (1953); N. D. Cent. Code Ann., c. 12-23 (1959); Ohio Rev. Code

and carefully circumscribed exceptions, lotteries.⁶ Even Nevada, which permits many forms of gambling, retains criminal penalties upon lotteries and certain other wager-

Ann., c. 2915 (1953); Okla. Stat. Ann., Tit. 21, c. 38 (1958); Ore. Rev. Stat. § 167.505 (1965); Pa. Stat. Ann., Tit. 18, §§ 4603-4607 (1963); R. I. Gen. Laws Ann., Tit. 11, c. 19 (1956); S. C. Code Ann., Tit. 16, c. 8, Art. 1 (1962); S. D. Code, Tit. 24, c. 2401 (1939); Tenn. Code Ann., Tit. 39, c. 20 (1955); Tex. Pen. Code Ann., c. 6 (1952); Utah Code Ann., Tit. 76, c. 27 (1953); Vt. Stat. Ann., Tit. 13, c. 43, subch. 2 (1959); Va. Code Ann., Tit. 18, c. 7, Art. 2 (1950); Wash. Rev. Code, Tit. 9, c. 947 (1962); W. Va. Code Ann., c. 61, Art. 10 (1961); Wis. Stat. Ann., c. 945 (1958); Wyo. Stat. Ann., Tit. 6, c. 9, Art. 2 (1957). These statutes of course vary in their terms and scope, but these variations scarcely detract from the breadth or prevalence of the penalties which in combination they create.

⁶ New Hampshire conducts a state sweepstakes, but imposes broad criminal penalties upon privately operated lotteries. N. H. Rev. Stat. Ann., c. 577 (1964). The following illustrate the other state statutes which impose criminal penalties upon lottery activities which would be taxable under these federal statutes. Ala. Code, Tit. 14, c. 46 (1958); Alaska Laws § 65-13-1 (1949); Ariz. Rev. Stat. § 13-436 (1965); Ark. Stat. § 41-2024 (1947); Cal. Pen. Code §§ 319-326 (1956); Colo. Rev. Stat., c. 40, Art. 16 (1963); Del. Code Ann. §§ 11:661-11:664 (1953); D. C. Code Ann. § 22-1501 (1967); Fla. Stat. Ann. § 849.09 (1963); Ga. Code Ann., c. 26-65 (1953); Hawaii Rev. Laws, c. 288 (1955); Idaho Code Ann., Tit. 18, c. 49 (1948); Ill. Rev. Stat., c. 38, Art. 28 (1965); Ind. Stat. Ann., Tit. 10, c. 23 (1956); Iowa Code Ann. § 726.8 (1950); Kan. Gen. Stat. Ann., c. 21, Art. 15 (1964); Ky. Rev. Stat. § 436.360 (1963); La. Stat. Ann. § 14:90 (1951); Me. Rev. Stat. Ann., Tit. 17, c. 81 (1964); Md. Ann. Code, Art. 27, § 356 (1957); Mass. Ann. Laws, c. 271 (1956); Mich. Stat. Ann., Tit. 28, c. LV (19—); Minn. Stat. Ann. § 614.01 (1964); Miss. Code Ann. §§ 2270-2279 (1942); Mo. Rev. Stat. Ann. § 563.430 (1959); Mont. Rev. Codes Ann., Tit. 94, c. 30 (1947); Neb. Rev. Stat. § 28-961 (1943); N. J. Stat. Ann., Tit. 2A, c. 121 (1953); N. M. Stat. Ann., c. 40A, Art. 19 (1953); N. Y. Pen. Law, Art. 225 (1967); N. C. Gen. Stat. §§ 14-289-14-291 (1953); N. D. Cent. Code Ann., c. 12-24 (1959); Ohio Rev. Code Ann., c. 2915 (1953); Okla. Stat. Ann., Tit. 21, c. 41 (1958); Ore. Rev. Stat. § 167.405 (1965); Pa. Stat.

ing activities taxable under these statutes. Nev. Rev. Stat., Tit. 41, c. 462, §§ 293.603, 465.010 (1957).

Connecticut, in which petitioner allegedly conducted his activities, has adopted a variety of measures for the punishment of gambling and wagering. It punishes "Any person, whether as principal, agent, or servant, who owns, possesses, keeps, manages, maintains or occupies" premises employed for purposes of wagering or pool selling. Conn. Gen. Stat. Rev. § 53-295' (1958). It imposes criminal penalties upon any person who possesses, keeps, or maintains premises in which policy playing occurs, or lotteries are conducted, and upon any person who becomes the custodian of books, property, appliances, or apparatus employed for wagering. Conn. Gen. Stat. Rev. § 53-298 (1958). See also §§ 53-273, 53-290, 53-293. It provides additional penalties for those who conspire to organize or conduct unlawful wagering activities. Conn. Gen. Stat. Rev. § 54-197 (1958). Every aspect of petitioner's wagering activities thus subjected him to possible state or federal prosecution. By any standard, in Connecticut and throughout the United States, wagering is "an area permeated with criminal statutes," and those engaged in wagering are a group "inherently suspect of criminal activities." *Albertson v. SACB*, 382 U. S. 70, 79.

Information obtained as a consequence of the federal wagering tax laws is readily available to assist the efforts of state and federal authorities to enforce these penalties.

Ann., Tit. 18, §§ 4601-4602 (1963); R. I. Gen. Laws Ann., Tit. 11, c. 19 (1956); S. C. Code Ann., Tit. 16, c. 8, Art. 1 (1962); S. D. Code, Tit. 24, c. 24.01 (1939); Tenn. Code Ann. § 39-2017 (1955); Tex. Pen. Code Ann., Art. 654 (1952); Utah Code Ann., Tit. 76, c. 27 (1953); Vt. Stat. Ann., Tit. 13, c. 43, subch. 1 (1959); Va. Code Ann., Tit. 18, c. 7, Art. 2 (1950); Wash. Rev. Code, Tit. 9, c. 9.59 (1962); W. Va. Code Ann., c. 61, Art. 10 (1961); Wis. Stat. Ann., c. 945 (1958); Wyo. Stat. Ann., Tit. 6, c. 9, Art. 2 (1957).

Section 6107 of Title 26 requires the principal internal revenue offices to provide to prosecuting officers a listing of those who have paid the occupational tax. Section 6806 (c) obliges taxpayers either to post the revenue stamp "conspicuously" in their principal places of business, or to keep it on their persons, and to produce it on the demand of Treasury officers. Evidence of the possession of a federal wagering tax stamp, or of payment of the wagering taxes, has often been admitted at trial in state and federal prosecutions for gambling offenses;⁷ such evidence has doubtless proved useful even more frequently to lead prosecuting authorities to other evidence upon which convictions have subsequently been obtained.⁸ Finally, we are obliged to notice that a former Commissioner of Internal Revenue has acknowledged that the Service "makes available" to law enforcement agencies the names and addresses of those who have paid the wagering taxes, and that it is in "full cooperation" with the efforts of the Attorney General of the United States to suppress organized gambling. Caplin, *The Gambling Business and Federal Taxes*, 8 *Crime and Delinquency* 371, 372, 377.

In these circumstances, it can scarcely be denied that the obligations to register and to pay the occupational

⁷ See, e. g., *Irvine v. California*, 347 U. S. 128; *United States v. Zizzo*, 338 F. 2d 577; *Commonwealth v. Fiorine*, 202 Pa. Sup. 88, 195 A. 2d 119; *State v. Curry*, 92 Ohio App. 1, 109 N. E. 2d 298; *State v. Reinhardt*, 229 La. 673, 86 So. 2d 530; *Griggs v. State*, 37 Ala. App. 605, 73 So. 2d 382; *McClary v. State*, 211 Tenn. 46, 362 S. W. 2d 450. See also *State v. Baum*, 230 La. 247, 88 So. 2d 209.

⁸ One State has gone a step further to facilitate the enforcement of its gambling prohibitions through the federal wagering tax. Illinois requires each holder of a wagering tax stamp to register with the clerks of the counties in which he resides or conducts any business, and imposes fines and imprisonment upon those who do not. Ill. Rev. Stat., c. 38, § 28-4 (1965).

tax created for petitioner "real and appreciable," and not merely "imaginary and unsubstantial," hazards of self-incrimination. *Reg. v. Boyes*, 1 B. & S. 311, 330; *Brown v. Walker*, 161 U. S. 591, 599-600; *Rogers v. United States*, 340 U. S. 367, 374. Petitioner was confronted by a comprehensive system of federal and state prohibitions against wagering activities; he was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant "link in the chain"⁹ of evidence tending to establish his guilt.¹⁰ Unlike the income tax return in question in *United States v. Sullivan*, 274 U. S. 259, every portion of these requirements had the direct and unmistakable consequence of incriminating petitioner; the application of the constitutional privilege to the entire registration procedure was in this instance neither

⁹ The metaphor is to be found in the opinions both of Lord Eldon in *Paxton v. Douglas*, 19 Ves. Jr. 225, 227, and of Chief Justice Marshall in *United States v. Burr*; *In re Willie*, 25 Fed. Cas. 38, 40 (No. 14,692 e).

¹⁰ We must note that some States and municipalities have undertaken to punish compliance with the federal wagering tax statutes in an even more direct fashion. Alabama has created a statutory presumption that possessors of federal wagering tax stamps are in violation of state law. Ala. Code, Tit. 14, §§ 302 (8)-(10) (1958). Florida adopted a similar statute, Fla. Stat. Ann. § 849.051 (1963), but it was subsequently declared unconstitutional by the Florida Supreme Court. *Jefferson v. Sweat*, 76 So. 2d 494. The Supreme Court of Tennessee has upheld an ordinance adopted by the City of Chattanooga which makes possession of a federal tax stamp a misdemeanor. *Deitch v. City of Chattanooga*, 195 Tenn. 245, 258 S. W. 2d 450. See for a similar provision Rev. Ord., Kansas City, Missouri, § 23.110 (1956); and *Kansas City v. Lee*, 414 S. W. 2d 251. Georgia has recently provided by statute that the possession or purchase of a federal wagering tax stamp is "prima facie evidence of guilt" of professional gambling. Ga. Code Ann. § 26-6413 (Supp. 1967). See for a similar rule *McClary v. State*, *supra*.

"extreme" nor "extravagant." See *id.*, at 263. It would appear to follow that petitioner's assertion of the privilege as a defense to this prosecution was entirely proper, and accordingly should have sufficed to prevent his conviction.

Nonetheless, this Court has twice concluded that the privilege against self-incrimination may not appropriately be asserted by those in petitioner's circumstances. *United States v. Kahriger, supra*; *Lewis v. United States, supra*. We must therefore consider whether those cases have continuing force in light of our more recent decisions. Moreover, we must also consider the relevance of certain collateral lines of authority; in particular, we must determine whether either the "required records" doctrine, *Shapiro v. United States*, 335 U. S. 1, or restrictions placed upon the use by prosecuting authorities of information obtained as a consequence of the wagering taxes, cf. *Murphy v. Waterfront Commission*, 378 U. S. 52, should be utilized to preclude assertion of the constitutional privilege in this situation. To these questions we turn.

III.

The Court's opinion in *Kahriger* first suggested that a defendant under indictment for willful failure to register under § 4412 cannot properly challenge the constitutionality under the Fifth Amendment of the registration requirement. For this point, the Court relied entirely upon Mr. Justice Holmes' opinion for the Court in *United States v. Sullivan, supra*. The taxpayer in *Sullivan* was convicted of willful failure to file an income tax return, despite his contention that the return would have obliged him to admit violations of the National Prohibition Act. The Court affirmed the conviction, and rejected the taxpayer's claim of the privilege. It concluded that most of the return's questions would not have compelled the taxpayer to make incrim-

inating disclosures, and that it would have been "an extreme if not an extravagant application" of the privilege to permit him to draw within it the entire return. 274 U. S., at 263.

The Court in *Sullivan* was evidently concerned, first, that the claim before it was an unwarranted extension of the scope of the privilege, and, second, that to accept a claim of privilege not asserted at the time the return was due would "make the taxpayer rather than a tribunal the final arbiter of the merits of the claim." *Albertson v. SACB*, 382 U. S. 70, 79. Neither reason suffices to prevent this petitioner's assertion of the privilege. The first is, as we have indicated, inapplicable, and we find the second unpersuasive in this situation. Every element of these requirements would have served to incriminate petitioner; to have required him to present his claim to Treasury officers would have obliged him "to prove guilt to avoid admitting it." *United States v. Kahriger, supra*, at 34 (concurring opinion). In these circumstances, we cannot conclude that his failure to assert the privilege to Treasury officials at the moment the tax payments were due irretrievably abandoned his constitutional protection. Petitioner is under sentence for violation of statutory requirements which he consistently asserted at and after trial to be unconstitutional; no more can here be required.

Second, the Court held in *Lewis* that the registration and occupational tax requirements do not infringe the constitutional privilege because they do not compel self-incrimination, but merely impose on the gambler the initial choice of whether he wishes, at the cost of his constitutional privilege, to commence wagering activities. The Court reasoned that even if the required disclosures might prove incriminating, the gambler need not register or pay the occupational tax if only he elects to cease,

or never to begin, gambling. There is, the Court said, "no constitutional right to gamble." 348 U. S., at 423.

We find this reasoning no longer persuasive. The question is not whether petitioner holds a "right" to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. Such inferences, bottomed on what must ordinarily be a fiction, have precisely the infirmities which the Court has found in other circumstances in which implied or uninformed waivers of the privilege have been said to have occurred. See, *e. g.*, *Carnley v. Cochrane*, 369 U. S. 506. Compare *Johnson v. Zerbst*, 304 U. S. 458; and *Glasser v. United States*, 315 U. S. 60. To give credence to such "waivers" without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through "ingeniously drawn legislation." Morgan, *The Privilege against Self-Incrimination*, 34 Minn. L. Rev. 1, 37. We cannot agree that the constitutional privilege is meaningfully waived merely because those "inherently suspect of criminal activities" have been commanded either to cease wagering or to provide information incriminating to themselves, and have ultimately elected to do neither.

Third, the Court held in both *Kahriger* and *Lewis* that the registration and occupational tax requirements are entirely prospective in their application, and that the constitutional privilege, since it offers protection only as to past and present acts, is accordingly unavailable. This reasoning appears to us twice deficient: first, it overlooks the hazards here of incrimination as to past or

present acts; and second, it is hinged upon an excessively narrow view of the scope of the constitutional privilege.

Substantial hazards of incrimination as to past or present acts plainly may stem from the requirements to register and to pay the occupational tax. See generally McKee, *The Fifth Amendment and the Federal Gambling Tax*, 5 Duke B. J. 86. In the first place, satisfaction of those requirements increases the likelihood that any past or present gambling offenses will be discovered and successfully prosecuted. It both centers attention upon the registrant as a gambler, and compels "injurious disclosure[s]"¹¹ which may provide or assist in the collection of evidence admissible in a prosecution for past or present offenses. These offenses need not include actual gambling; they might involve only the custody or transportation of gambling paraphernalia, or other preparations for future gambling. Further, the acquisition of a federal gambling tax stamp, requiring as it does the declaration of a present intent to commence gambling activities, obliges even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of interstate facilities for gambling purposes. See, e. g., *Acklen v. State*, 196 Tenn. 314; 267 S. W. 2d 101.

There is a second, and more fundamental, deficiency in the reasoning of *Kahriger* and *Lewis*. Its linchpin is plainly the premise that the privilege is entirely inapplicable to prospective acts; for this the Court in *Kahriger* could vouch as authority only a generalization at 8 Wigmore, Evidence § 2259 (c) (3d ed. 1940).¹² We see no war-

¹¹ *Hoffman v. United States*, 341 U. S. 479, 487.

¹² We presume that the Court referred to the following: "There is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in the future be criminal at

rant for so rigorous a constraint upon the constitutional privilege. History, to be sure, offers no ready illustrations of the privilege's application to prospective acts, but the occasions on which such claims might appropriately have been made must necessarily have been very infrequent. We are, in any event, bid to view the constitutional commands as "organic living institutions," whose significance is "vital not formal." *Gompers v. United States*, 233 U. S. 604, 610.

The central standard for the privilege's application has been whether the claimant is confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination. *Rogers v. United States*, 340 U. S. 367, 374; *Brown v. Walker*, 161 U. S. 591, 600. This principle does not permit the rigid chronological distinction adopted in *Kahriger* and *Lewis*. First, we see no reason to suppose that the force of the constitutional prohibition is diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to evidence. Yet, if the factual situations in which the privilege may be claimed were inflexibly defined by a chronological formula, the policies which the constitutional privilege is intended to serve could easily be evaded. Moreover, although prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination, this will scarcely always prove true. As we shall show, it is not true here. We conclude that it is not mere time to which the law must look, but the substantiality of the risks of incrimination.

The hazards of incrimination created by §§ 4411 and 4412 as to future acts are not trifling or imaginary. Prospective registrants can reasonably expect that registra-

the choice of the party reporting." 8 Wigmore, *supra*, at 349. But see Morgan, *supra*, at 37; and McKay, Self-Incrimination and the New Privacy, 1967 Sup. Ct. Rev. 193, 221.

tion and payment of the occupational tax will significantly enhance the likelihood of their prosecution for future acts, and that it will readily provide evidence which will facilitate their convictions. Indeed, they can reasonably fear that registration, and acquisition of a wagering tax stamp, may serve as decisive evidence that they have in fact subsequently violated state gambling prohibitions. Compare Ala. Code, Tit. 14, §§ 302 (8)–(10) (1958); Ga. Code Ann. § 26–6413 (Supp. 1967). Insubstantial claims of the privilege as to entirely prospective acts may certainly be asserted, but such claims are not here, and they need only be considered when a litigant has the temerity to pursue them.

We conclude that nothing in the Court's opinions in *Kahriger* and *Lewis* now suffices to preclude petitioner's assertion of the constitutional privilege as a defense to the indictments under which he was convicted. To this extent *Kahriger* and *Lewis* are overruled.

IV.

We must next consider the relevance in this situation of the "required records" doctrine; *Shapiro v. United States*, 335 U. S. 1. It is necessary first to summarize briefly the circumstances in *Shapiro*. Petitioner, a wholesaler of fruit and produce, was obliged by a regulation issued under the authority of the Emergency Price Control Act to keep and "preserve for examination" various records "of the same kind as he has customarily kept" Maximum Price Regulation 426, § 14, 8 Fed. Reg. 9546, 9548–9549 (1943). He was subsequently directed by an administrative subpoena to produce certain of these records before attorneys of the Office of Price Administration. Petitioner complied, but asserted his constitutional privilege. In a prosecution for violations of the Price Control Act, petitioner urged that the records had facilitated the collection of evidence against him, and claimed immunity from prosecution under § 202 (g) of

the Act. Petitioner was nonetheless convicted, and his conviction was affirmed. 159 F. 2d 890.

On certiorari, this Court held both that § 202 (g) did not confer immunity upon petitioner, and that he could not properly claim the protection of the privilege as to records which he was required by administrative regulation to preserve. On the second question, the Court relied upon the cases which have held that a custodian of public records may not assert the privilege as to those records, and reiterated a dictum in *Wilson v. United States*, 221 U. S. 361, 380, suggesting that "the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'" ¹³ 335 U. S., at 33. The Court considered that "it cannot be doubted" that the records in question had "public aspects," and thus held that petitioner, as their custodian, could not properly assert the privilege as to them. *Id.*, at 34.

We think that neither *Shapiro* nor the cases upon which it relied are applicable here.¹⁴ Compare generally

¹³ The Court in fact quoted from the reiteration of the *Wilson* dictum included in *Davis v. United States*, 328 U. S. 582, 590.

¹⁴ The United States has urged that this case is not reached by *Shapiro* simply because petitioner was required to submit reports, and not to maintain records. Insofar as this is intended to suggest the crucial issue respecting the applicability of *Shapiro* is the method by which information reaches the Government, we are unable to accept the distinction. We perceive no meaningful difference between an obligation to maintain records for inspection, and such an obligation supplemented by a requirement that those records be filed periodically with officers of the United States. We believe, as the United States itself argued in *Shapiro*, that "Regulations permit records to be retained, rather than filed, largely for the convenience of the persons regulated." Brief for the United States in No. 49, October Term 1947, at 21, n. 7.

Note, Required Information and the Privilege against Self-Incrimination, 65 Col. L. Rev. 681; and McKay, *supra*, at 214-217. Moreover, we find it unnecessary for present purposes to pursue in detail the question, left unanswered in *Shapiro*, of what "limits . . . the Government cannot constitutionally exceed in requiring the keeping of records" *Id.*, at 32. It is enough that there are significant points of difference between the situations here and in *Shapiro* which in this instance preclude, under any formulation, an appropriate application of the "required records" doctrine.

Each of the three principal elements of the doctrine, as it is described in *Shapiro*, is absent from this situation. First, petitioner Marchetti was not, by the provisions now at issue, obliged to keep and preserve records "of a kind he has customarily kept"; he was required simply to provide information, unrelated to any records which he may have maintained, about his wagering activities. This requirement is not significantly different from a demand that he provide oral testimony. Compare McKay, *supra*, at 221. Second, whatever "public aspects" there were to the records at issue in *Shapiro*, there are none to the information demanded from Marchetti. The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress. Third, the requirements at issue in *Shapiro* were imposed in "an essentially non-criminal and regulatory area of inquiry" while those here are directed to a "selective group inherently suspect of criminal activities." Cf. *Albertson v. SACB*, 382 U. S. 70, 79.

The United States' principal interest is evidently the collection of revenue, and not the punishment of gamblers, see *Calamaro v. United States*, 354 U. S. 351, 358; but the characteristics of the activities about which information is sought, and the composition of the groups to which inquiries are made, readily distinguish this situation from that in *Shapiro*. There is no need to explore further the elements and limitations of *Shapiro* and the cases involving public papers; these points of difference in combination preclude any appropriate application of those cases to the present one.

V.

Finally, we have been urged by the United States to permit continued enforcement of the registration and occupational tax provisions, despite the demands of the constitutional privilege, by shielding the privilege's claimants through the imposition of restrictions upon the use by federal and state authorities of information obtained as a consequence of compliance with the wagering tax requirements. It is suggested that these restrictions might be similar to those imposed by the Court in *Murphy v. Waterfront Commission*, 378 U. S. 52.

The Constitution of course obliges this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise. But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers. We do not, as we have said, doubt Congress' power to tax activities which are, wholly or in part, unlawful. Nor can it be doubted that the privilege against self-incrimination may not properly be asserted if other protection is granted which "is so broad as to have the same extent in scope and effect" as the privilege itself. *Counselman v. Hitchcock*, 142 U. S. 547, 585. The Government's suggestion is thus in principle an attractive and

apparently practical resolution of the difficult problem before us. Compare *Mansfield, supra*, at 159; and *McKay, supra*, at 232. Nonetheless, we think that it would be entirely inappropriate in the circumstances here for the Court to impose such restrictions.

The terms of the wagering tax system make quite plain that Congress intended information obtained as a consequence of registration and payment of the occupational tax to be provided to interested prosecuting authorities. See 26 U. S. C. § 6107.¹⁵ This has evidently been the consistent practice of the Revenue Service. We must therefore assume that the imposition of use-restrictions would directly preclude effectuation of a significant element of Congress' purposes in adopting the wagering taxes.¹⁶ Moreover, the imposition of such restrictions would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection with information

¹⁵ Section 6107 reads as follows:

"In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon the application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as a public record, for which a fee of \$1 for each 100 words or fraction thereof in the copy or copies so requested may be charged." The special taxes to which the section refers include the occupational tax imposed by 26 U. S. C. § 4411.

¹⁶ The requirement now embodied in § 6107 was adopted prior to the special occupational tax on wagering, but Congress plainly indicated when it adopted the latter that it understood, and wished, that state prosecuting authorities would be provided lists of those who had paid the wagering tax. See H. R. Rep. No. 586, 82d Cong., 1st Sess., 60; S. Rep. No. 781, 82d Cong., 1st Sess., 118.

obtained as a consequence of the wagering taxes;¹⁷ the federal requirements would thus be protected only at the cost of hampering, perhaps seriously, enforcement of state prohibitions against gambling. We cannot know how Congress would assess the competing demands of the federal treasury and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values.¹⁸ We therefore must decide that it would be improper for the Court to impose restrictions of the kind urged by the United States.

VI.

We are fully cognizant of the importance for the United States' various fiscal and regulatory functions of timely and accurate information, compare *Mansfield, supra*, and *Meltzer, Required Records*, the *McCarran Act* and the *Privilege against Self-Incrimination*, 18 U. Chi. L. Rev. 687; but other methods, entirely consistent with constitutional limitations, exist by which Congress may obtain such information. See generally *Counselman v. Hitchcock, supra*, at 585; compare *Murphy v. Waterfront Commission, supra*. Accordingly, nothing we do today will

¹⁷ The Court required such a showing as part of the restrictions imposed in *Murphy*, 378 U. S., at 79, n. 18. The United States has acknowledged that this would be no less imperative here. Brief for the United States 24-25.

¹⁸ It should be emphasized that it would not suffice here simply to sever § 6107. See 26 U. S. C. § 7852 (a). Cf. *Warren v. Mayor of Charlestown*, 2 Gray 84, 99; *Carter v. Carter Coal Co.*, 298 U. S. 238, 316. We would be required not merely to strike out words, but to insert words that are not now in the statute. Here, as in the analogous circumstances of *United States v. Reese*, 92 U. S. 214, "This would, to some extent, substitute the judicial for the legislative department of the government To limit this statute in the manner now asked would be to make a new law, not to enforce an old one. This is no part of our duty." *Id.*, at 221.

prevent either the taxation or the regulation by Congress of activities otherwise made unlawful by state or federal statutes.

* Nonetheless, we can only conclude, under the wagering tax system as presently written, that petitioner properly asserted the privilege against self-incrimination, and that his assertion should have provided a complete defense to this prosecution. This defense should have reached both the substantive counts for failure to register and to pay the occupational tax, and the count for conspiracy to evade payment of the tax. We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

[For concurring and dissenting opinions see No. 12, *Grosso v. United States*, decided this day.]